Petition

81-645

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No. ....
IN THE

Supreme Court of the United States

October Term, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ("IAM"), an Association,

Petitioner,

— Against —

THE ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES, ("OPEC"); THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA, ("ALGERIA"); THE REPUBLIC OF ECUADOR, ("ECUADOR"); THE GABONESE REPUBLIC, ("GABON"); REPUBLIC OF INDONESIA, ("INDONESIA"); IMPERIAL GOVERNMENT OF IRAN, ("IRAN"); REPUBLIC OF IRAQ, ("IRAQ"); STATE OF KUWAIT, ("KUWAIT"); LIBYAN ARAB REPUBLIC, ("LIBYA"); FEDERAL REPUBLIC OF NIGERIA, ("NIGERIA"); STATE OF QATAR, ("QATAR"); KINGDOM OF SAUDI ARABIA, ("SAUDI ARABIA"); STATE OF UNITED ARAB EMIRATES, ("UNITED ARAB EMIRATES"); and THE REPUBLIC OF VENEZUELA, ("VENEZUELA"),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented for Review.

1. Does an otherwise commercial activity become a sovereign activity when an arguably sovereign interest is served by that commercial activity?

2. Does the act of state doctrine apply to the acts of a government outside its own borders, and has the lower court merely permitted sovereign immunity to "reenter through the back door" of the act of state doctrine?

3. May foreign states be sued as "persons" in United States courts under the Sherman and Clayton Acts?

4. Is a pre-existing cost-plus contract essential to circumvention of the *Illinois Brick* rule barring price-fixing actions by indirect purchasers?

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (hereinafter "I.A.M."), respectfully prays that a Writ of Certiorari

issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 6, 1981.

OPINIONS BELOW.

The Memorandum of Decision and Order of Judgment for Defendants filed and entered by the United States District Court on September 18, 1979, and unofficially reported at 477 F.Supp. 553, is annexed hereto and labeled Appendix A.

The Opinion of the Ninth Circuit Court of Appeals, officially reported at pages 3300-3308 of the 1981 Term Slip Opinions of said Court, and unofficially reported at 649 F.2d 1354, is annexed hereto, and labeled Appendix B.

JURISDICTION.

The Judgment of the Court of Appeals was entered in this case on July 6, 1981.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS.

This case involves the following statutes:

15 U.S.C. §1; 15 U.S.C. §2; 15 U.S.C. §7; 15 U.S.C. §8; 15 U.S.C. §12; 15 U.S.C. §15; 15 U.S.C. §26; 15 U.S.C. §72; 15 U.S.C. §753(b)(2)(A); 28 U.S.C. §1602; 28 U.S.C. §1603; 28 U.S.C. §1604; 28 U.S.C. §1605(a)(2); and 28 U.S.C. §1330; all of which are reproduced at Appendix C.

STATEMENT OF THE CASE.

The Complaint herein was filed on December 28, 1978, alleging violations of the Sherman and Clayton Acts, with jurisdiction resting on the Foreign Sovereign Immunities Act of 1976, ("F.S.I.A."), 28 U.S.C. §1602, *et seq.*, in

particular 28 U.S.C. §1605(a)(2). The District Court's jurisdiction was further founded on 28 U.S.C. §1330.

Defaults were entered by the District Court Clerk as to all defendants, and a hearing ordered by the Honorable A. Andrew Hauk pursuant to 28 U.S.C. §1608(e), which prohibits the entry of default judgment against a foreign sovereign "unless claimant establishes his claim or right to relief by evidence satisfactory to the court."

After a four day trial, the District Court ruled for the defendants and the case was dismissed; on appeal, the Ninth Circuit affirmed the lower court's decision.

Background.

The Organization of the Petroleum Exporting Countries (hereinafter "OPEC") was born in 1960, consisting initially of the respondents Venezuela, Saudi Arabia, Kuwait, Iraq and Iran. Thereafter, the Organization was joined by the United Arab Emirates, Qatar, Nigeria, Libya, Indonesia, Gabon, Ecuador and Algeria, also respondents herein.

Since its formation, OPEC, and the members thereof, have made no secret of their meetings nor of their price setting and production controls. A more overt combination of price fixing entities is difficult to envision.

That energy costs have skyrocketed in the past two decades is manifest, especially since 1973. It is ironic that OPEC's recent failure to agree on a uniform price for its oil was more newsworthy than the steady increases consumers have come to expect since the formation of the cartel.

Petitioner, I.A.M., is a non-profit association, purchasing and using oil and petroleum products prior to and during the course of this litigation. In the complaint herein, I.A.M. has alleged injury and damage to its business and property as a result of monopoly pricing by OPEC.

ARGUMENT IN FAVOR OF ALLOWING THE WRIT.

Introduction.

Since enactment of the F.S.I.A. in 1976, court after court has struggled with the Act's construction in relation to the foreign states it was designed for. Although the F.S.I.A. was intended to be a codification and clarification of the restrictive theory of sovereign immunity, confusion has surrounded its application.

Congress made it clear that ". . . claims of foreign states to immunity should henceforth be decided by courts of the United States . . ." 28 U.S.C. §1602, yet the Court of Appeals herein has stated that "courts should not enter at the will of litigants into a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint." Appendix B16.

While all Federal Courts have been criticized recently for "making" law, there remain critical questions of "applying" law laid out by Congress. One of those critical questions is the interpretation of when and where sovereigns are engaging in "commercial" activity. In this case, the Ninth Circuit has sidestepped the commercial activity issue entirely, basing its decision solely on the act of state doctrine. The legislative history of the F.S.I.A., however, makes it clear that application of the act of state doctrine is *improper* in a commercial activity situation.[1]

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[1] "The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be *improperly* asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill v. Republic of Cuba*, 44 U.S.L.W. 4665, No. 73-1288 (May 24, 1976), the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted

There is further lack of clarity as to whether foreign states qualify as "persons" for purposes of being defendants under our antitrust laws. This is especially true since *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563.

Finally, the lower courts are quick to cite *Illinois Brick v. Illinois*, 431 U.S. 730, 97 S.Ct. 2061, 52 L.Ed.2d 707 as absolutely barring price-fixing actions by indirect purchasers, notwithstanding the types of exceptions indicated by this Court therein.

Given the unsettled nature of these important federal questions and the conflicts within the lower circuits, this Court alone has the authority, opportunity, and final responsibility to make clear these presently clouded areas.

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to assert that a refusal to pay a commercial obligation was not reviewable because it was an 'act of state'.

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to *reject improper assertions of the act of state doctrine*. For example it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of commercial activity involving significant jurisdictional contacts with this country. The conclusions of the committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

'[U]nder the modern restrictive theory of sovereign immunity a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of "acts of state" would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine.' " (Amicus Brief of United States, p. 41.) [1976] U.S. Cong. and Admin. News, p. 6619, fn. 1. (Emphasis supplied).

It has been and continues to be petitioner's position that respondents' fixing of the price of oil is the epitome of commercial activity, and therefore not properly addressed by the act of state doctrine.

Commercial Activity.

"Commercial activity" is defined in the F.S.I.A. retroflexively, to wit: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. §1603(d).

A review of the cases seeking to interpret this statute demonstrates serious inconsistency in judicial understanding of this definition, however.

The Fifth Circuit Court of Appeals found that the commercial activity exception to sovereign immunity does not depend on whether the defendant generally engages in a commercial enterprise or activity, but rather on whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with *commercial activity*, regardless of the *defendant's* generally commercial or governmental *character*. *Arango v. Guzman Travel Advisors Corp.* (1980, C.A. 5 Fla.) 621 F.2d 1371, 1379. Accordingly, that court found Dominicana, the national airline of the Dominican Republic, *both* a commercial entity pursuant to its tour warranties, *and* a sovereign entity pursuant to its "involuntary re-routing" of passengers in accordance with immigration procedures. 621 F.2d 1371, 1379.

In the Third Circuit, however, a national airline's operations were held to be commercial and the airline *not* immune to plaintiff's claim for damages by reason of extended, unanticipated and unexplained delay at a foreign state's airport. *Sugarman v. Aeromexico, Inc.* (1980, C.A. 3 N.J.) 626 F.2d 270, 272-275.

Both the *Arango* and *Sugarman* courts reviewed actions sounding in tort against airlines wholly owned by their governments. "Involuntary re-routing" was held to be not commercial, but negligent delay was held to be commercial.

In our own case, while the Ninth Circuit based its decision on the act of state doctrine, the District Court had characterized the extraction and sale of domestic oil by respondents as a *sovereign act*, one of conserving natural resources. Appendix A18-22.

Although additional questions were raised in the instant case, the *Arango* and *Sugarman* decisions nonetheless make it clear that the Circuits are in conflict over the interpretation and application of, as here, the commercial activity test. The need for resolution of these questions of federal law is therefore pressing, especially given the ever-increasing presence of governments in international commerce.

The varying results reached in the District of Columbia Circuit Court of Appeals and in the district courts when confronted with a commercial activity question further demonstrate the unsettled nature of this area. See *Broadbent v. Organization of American States* (1980, App. D.C.) 628 F.2d 27, 33-35; *Yessenin-Volpin v. Novosti Press Agency* (1978, D.C.N.Y.) 443 F.Supp. 849, 855-857; *United Euram Corp. v. Union of Soviet Socialist Republics* (1978, D.C.N.Y.) 461 F.Supp. 609, 610-612; *East Europe Domestic International Sales Corp. v. Terra* (1979, S.D.N.Y.) 467 F.Supp. 383, 388-390, affirmed without opinion (C.A. 2 N.Y.) 610 F.2d 806; *Behring International, Inc. v. Imperial Iranian Air Force* (1979, D.C.N.J.) 475 F.Supp. 383, 388-390; *Perez v. Bahamas* (1980, D.C. Dist. Col.) 482 F.Supp. 1208, 1210; *Jones v. Shipping Corp. of India, Ltd.* (1980, E.D. Va.) 491 F.Supp. 1260, 1262-1263.

Clearly, the *nature* of an act, whether it be commercial or sovereign, does not change according to who performs it. Yet a problem lies in that there has been no clear direction from Congress as to what defines "commercial activity" when it is a *sovereign* who performs it. It is therefore nec-

essary for this Court to set forth guidelines which can be utilized on a case by case basis to determine the commercial nature of a sovereign's given act or activity.

Act of State Doctrine.

The "classic" definition of the act of state doctrine was formulated by this Court in *Underhill v. Hernandez*, 168 U.S. 250 at 252, 18 S.Ct. 83 at 84, 42 L.Ed. 456 at 457 (1897):

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the *acts of the government of another done within its own territory*." (Emphasis supplied)

Moreover, this Court has recently reaffirmed the above definition in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 at 763, 92 S.Ct. 1808 at 1811, 32 L.Ed.2d 466 at 480, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 at 401, 84 S.Ct. 923 at 926, 11 L.Ed.2d 804 at 808 and in *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682 at 706, 96 S.Ct. 1854 at 1867, 48 L.Ed.2d 301 at 318.

It cannot therefore be gainsaid that the act of state doctrine applies to governmental acts *within* that government's own territory. Nevertheless, the Ninth Circuit herein has affirmed dismissal of this action based on the act of state doctrine, Appendix B16, despite extensive testimony relating to respondents' meetings *outside* their national borders. Their very numbers make it impossible for less than twelve of the OPEC members to be within their own territories during the meetings where the price of oil is fixed! See Appendix D2.

The posture of I.A.M. *ab initio* herein, has been that respondents' price-fixing activities are *commercial* in nature, thus excepting them from sovereign immunity to which

they might otherwise be entitled. Nevertheless, the Circuit Court below bypassed decision on the commercial activity question, relying instead on the act of state doctrine for authority.

That Court cited the legislative history of the F.S.I.A. for the proposition that "The Committee has found it unnecessary to address the act of state doctrine in this legislation." Appendix B11-12.

This incomplete quotation from the history is not only misleading, but glosses over the very reason why the Committee felt it need not address the doctrine—because the "courts already have considerable guidance enabling them to *reject improper assertions of the act of State doctrine*."[2] (Emphasis supplied). And the history makes it crystal clear that the very situation where assertion of the act of state doctrine was felt by the Committee to be *improper* was, as here, when a foreign state's commercial acts were involved:

> "To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine."[3]

Thus, in reaching its decision herein, the Ninth Circuit Court of Appeals has either enlarged the act of state doctrine beyond its present bounds, or has ignored it. In either case it has applied this important federal principle in a way in conflict with the above cited applicable decisions of this Court, and contrary to the expressed intent of Congress.

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[2] *Ibid.*
[3] *Ibid.*

Petitioner therefore respectfully prays this Court to review the Ninth Circuit's application of the act of state doctrine on Writ of Certiorari in this case.

Nations as "Persons".

This Court has spoken directly to the question whether foreign nations may use our courts to pursue antitrust actions against United States corporations, *Pfizer, Inc. v. Government of India*, 434 U.S. 308 at 320, 98 S.Ct. 584 at 591, 54 L.Ed.2d 563 at 574, answering in the affirmative.

The question presented in this case is whether foreign states may conversely be sued as defendants in our courts for their own antitrust violations.

Pfizer restated what petitioner believes to be the current United States judicial policy relating to our antitrust laws:

> " 'The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.' (Citations) And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any restrictive definition. Indeed, during the course of those debates the word 'person' was used interchangeably with other terms even broader in connotation." 434 U.S. at 312-313, 98 S.Ct. 584 at 587, 54 L.Ed.2d 563 at 569.

This Court went on to state that:

> "When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as may a private person or domestic State." 434 U.S. at 318, 98 S.Ct. at 590, 54 L.Ed.2d at 572.

Petitioner respectfully suggests that when a foreign nation enters our markets as a seller of goods, it can victimize our

citizens by anticompetitive practices just as surely as a private person or domestic state. And there can be no question that respondents herein have injected themselves into our marketplace. See Appendix E1-3.

The Ninth Circuit did not address the "person" issue in reaching its decision in the present case. The District Court, though, cited *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, for the proposition that since a domestic state is not a person which may be sued under the antitrust laws, then foreign states are not persons for the same purposes.

However, a District Court in Delaware has recently upheld a Sherman Act Section 2 action against an arm of the Polish government in the case of *Outboard Marine Corp. v. Pezetel*, 461 F.Supp. 384, 403-407 (D.C. Del. 1978).

Petitioner is unaware of any U.S. Court of Appeals which has upheld application of the Sherman or Clayton Acts to foreign states. However, given the increasing involvement of governments in international trade, this question is one of extreme and increasingly frequent importance to our legal and economic systems which petitioner prays this Court resolve.

Indirect Purchaser Action.

The District Court herein has cited *Illinois Brick Co. v. Illinois*, 431 U.S. 730, 97 S.Ct. 2061, 52 L.Ed.2d 707, for the proposition that "a plaintiff in a price-fixing case may recover only if it purchased directly from the alleged price-fixer." Appendix A6.

Petitioner's position, however, has consistently been that *Illinois Brick* provides merely inclusive examples of situations where market forces have been superseded, allowing pass-on defenses to be used. It implies that other economic

circumstances permitting a similar result should be given similar latitude.

The I.A.M. does not have a pre-existing cost-plus contract with any OPEC member, nor does it own or control any oil company. However, this Court recognized in *Illinois Brick* that "direct purchasers sometimes may refrain from bringing a treble damages suit for fear of disrupting relations with their suppliers." 431 U.S. at 746, 97 S.Ct. at 2074-2075, 52 L.Ed.2d at 725. This is precisely the problem presented by the instant case. United States oil companies are loath to do anything but walk with soft shoes regarding OPEC nations. The ballooning profits of the oil companies make it clear that OPEC price increases are being passed on to the petitioner virtually unabsorbed, that direct purchasers have no economic incentive to resist, and that unless petitioner is granted an exception to the *Illinois Brick* bar of indirect-purchaser actions it will be without defense or friendly intermediary.

The Ninth Circuit has allowed the lower court's decision herein to stand, which found as a conclusion of law that *only* direct purchasers may recover from a price-fixer. Petitioner sees this conclusion as being in direct conflict with *Illinois Brick* principles and prays that the Court settle this important question of federal law.

CONCLUSION.

Petitioner submits that interpretation of the "commercial activity" test under the F.S.I.A. is in an unsettled and confused state within the Circuit and District Courts.

In addition, the Ninth Circuit herein has rendered a very questionable ruling respecting application of the act of state doctrine, in apparent direct contravention of the expressed intent of the legislature, and of the guidelines set forth by this Court.

Further, the question of whether foreign states may be sued in our courts as "persons" under U.S. Antitrust Laws is an important and novel question of federal law unresolved heretofore.

Finally, the Ninth Circuit Court of Appeals has let stand a decision in direct conflict with the Court's holding in *Illinois Brick*.

For the above stated reasons, petitioner prays that a Writ of Certiorari be issued to review the judgment rendered by the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JAMES H. DAVIS,

Counsel for Petitioner.

APPENDIX.

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(213) 625-0711,
Counsel for Petitioner.

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APPENDIX A.

Memorandum of Decision and Order of Judgment and for Defendants.

United States District Court, Central District of California.

International Association of Machinists and Aerospace Workers, ("IAM"), An Association, Plaintiff, v. The Organization of the Petroleum Exporting Countries ("OPEC"); The Democratic and Popular Republic of Algeria, ("Algeria"); The Republic of Ecuador, ("Ecuador"); The Gabonese Republic, ("Gabon"); Republic of Indonesia, ("Indonesia"); Imperial Government of Iran, ("Iran"); Republic of Iraq, ("Iraq"); State of Kuwait, ("Kuwait"); Libyan Arab Republic, ("Libya"); Federal Republic of Nigeria, ("Nigeria"); State of Qatar, ("Qatar"); Kingdom of Saudi Arabia, ("Saudi Arabia"); State of United Arab Emirates, ("United Arab Emirates"); and the Republic of Venezuela, ("Venezuela"), Defendants.

No. 78-5012-AAH (SX).

APPEARANCES:

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INTRODUCTORY

In September, 1960, defendants Iran, Iraq, Kuwait, Saudi Arabia and Venezuela met in Baghdad, Iraq. The result of this meeting and subsequent meetings was the Organization of Petroleum Exporting Countries (hereinafter "OPEC"). Thereafter, defendants Algeria, Ecuador, Gabon, Indonesia, Libya, Nigeria, Qatar and The United Arab Emirates joined OPEC, bringing to 13 the number of member nations. The principal aim of this organization was stated as "the unification of petroleum policies for the Member Countries and the determination of the best means for safeguarding the interests of Member Countries individually and collectively." Resolution of the First Conference, Resolution 1.2(4). To accomplish this goal, the organization expressed the desire to "formulate a system to ensure the stabilization of prices by, among other means, the regulation of production, with regard to the interests of the producing and of the consuming nations, and to the necessity of securing a steady income to the producing countries, an efficient economic and regular supply of this source of energy to consuming nations. . . ." *Id.* Resolution 1.1(3) The system

that was implemented by OPEC included, among other features, the setting of prices for the sale of their crude oil.

Plaintiff International Association of Machinists and Aerospace Workers (hereinafter "IAM") filed this action in December 1978, by way of Complaint and then a day later by way of First Amended Complaint, challenging the price setting activities of OPEC and its 13 member nations, naming each nation and OPEC as defendants. Plaintiff alleged that these price setting activities violated Section 1 of the Sherman Act, 15 U.S.C. § 1[1], under which price fixing has, in a long line of cases,[2] been ruled a *per se* violation.[3] The injury plaintiff has allegedly received is the payment of higher prices for gasoline at the service station pumps, by virtue of the anticompetitive actions taken by defendants and the antitrust violations involved. In this action, plaintiff asks for damages under Section 4 of the Clayton Act, 15 U.S.C. § 15,[4] and injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26,[5] praying this Court to enjoin the price setting activities of these defendants, OPEC and member nations. Plaintiff claims that jurisdiction of this Court is based upon the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U.S.C. § 1602, *et seq.*, particularly 28 U.S.C. § 1605(a)(2),[6] as well as upon the Sherman and Clayton Acts.

On June 25, 1979, plaintiff moved for a preliminary injunction. At that time, none of the defendants had made an appearance in this action or had filed an opposition to that motion. Since default had been entered by the Clerk on only three of the defendants, and since the remainder of the defendants still had time within which they could file an answer, the motion for preliminary injunction was continued. This Court wanted to give each and every defendant a full opportunity to be heard prior to ruling on the motion for preliminary injunction. Furthermore, the Court was

aware of the constraints of the FSIA, in particular the provision that "No judgment by defendant shall be entered by the court . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Since the preliminary injunction sought by plaintiff would have given plaintiff a good measure of what it sought, it would have been inappropriate for this Court to proceed on an incomplete record without a full hearing. So the Court ordered the evidentiary hearing on the motion for preliminary injunction consolidated with the trial on the final injunction under Rule 65 of the Federal Rules of Civil Procedure, together with the evidentiary hearing on the motion for default judgment, all to be heard on August 20, 1979. In this manner, the requirements of 28 U.S.C. § 1608(e) could be fulfilled while allowing defendants sufficient time to appear and oppose this action and at the same time allowing plaintiff sufficient time to prepare and gather evidence in support of the injunction. Moreover, the Court also issued an Order To Show Cause asking for factual and legal assistance on some eighteen basic questions from the defendants, and from any other knowledgeable sources as *amici curiae*, with the requirements that plaintiff effect service on the defendants and on numerous Federal and State officials and agencies, and make copies available to the news media. See Appendix A.

In response, 11 briefs were submitted, and plaintiff and four *amici curiae* appeared by counsel. As ordered, the consolidated hearings and trial proceeded on August 20, 1979. As of that date, each of the 13 member nations had been validly served. Each, however, had chosen not to make an appearance in this action, and as a result, a default entry had been made by this Clerk of Court against each of the 13 member nations, with determination of whether the Court

would make and enter a default judgment to abide the outcome of the hearings and trial.

What follows now shall constitute the Court's written findings of fact and conclusions of law, pursuant to Rule 52(a) F.R. Civ. P.

At the outset, the Court pointed out that OPEC could not legally be served either under FSIA, 28 U.S.C. § 1602 ff., or under the International Organizations Immunities Act, (hereinafter "IOIA"), 22 U.S.C. § 288 *et seq.*, or otherwise, holding that FSIA applies only to foreign sovereignties, which OPEC is not; and, IOIA applies only to those international organizations "in which the United States participates," and the United States does not participate in OPEC. The Court added its doubts that OPEC could ever be legally served with process. But, in any event, plaintiff and its counsel admitted that OPEC could not be and had not been legally served. Whereupon the Court dismissed OPEC from the lawsuit and out of the case entirely.

Thereupon the consolidated hearings and trial commenced and ran four days and four evenings, usually from 9:30 a.m. to anywhere from 8:30 p.m., to 11:30 p.m., with appropriate recesses for rest, physical relief and meals. At the conclusion of a full day of argument, the Court issued its oral decision from the Bench dismissing the case as against all the remaining defendants, to wit, the 13 nations, members of OPEC, and ordering judgment against the plaintiff.

PLAINTIFF AS "INDIRECT PURCHASER"

1. *Damages*

In the early stages of the proceedings, the Court dismissed the damage portion of plaintiff's complaint. Plaintiff did not allege any direct purchase from defendants. The injury claimed allegedly resulted from the purchase of gasoline here in the United States. Since plaintiff did not allege or

show that it purchased any crude oil or gasoline from the defendants, or had any dealings with the defendants at all, it necessarily had to be and was and is an "indirect purchaser" of and from the defendant with respect to the gasoline it purchased in the United States. The most that plaintiff could show or claim was that it purchased in the United States, at service station pumps, gasoline which in part may have been refined in the United States by American companies from defendants' crude. Viewing the facts in a light most favorable to plaintiff, it is clear that since the defendants' crude oil passed f.o.b. the particular defendant country's port, was sold and title passed from defendants to purchasers at such ports, was sold again and title passed again and again — through crude buyers, crude shippers, crude resellers, refineries, was refined into gasoline, then went through gasoline distributors and marketing wholesalers and gasoline retailers — until the gasoline was purchased by plaintiff at the service station pumps, plaintiff was and is at the very best an indirect purchaser, eight times removed from the defendants, that is, an indirect purchaser of domestic gasoline eight times removed from defendants, and not a direct purchaser of defendants' foreign crude.

As an indirect purchaser, plaintiff is precluded from seeking damages. In *Illinois Brick Co. v. Illinois*, 431 U.S. 730 (1977), the Supreme Court held that a plaintiff in a price fixing case may recover only if it purchased directly from the alleged price fixer. An indirect purchaser may not recover on the basis of the so-called pass-on or pass-through doctrine, urged by plaintiff. Plaintiff cannot establish antitrust injury by showing that the additional cost imposed on crude oil by the price fixing defendants has been passed on to the plaintiff by the first direct purchaser from the defendants and any intermediate purchasers along the line

through the refineries and on to the service station pumps as gasoline.

The *Illinois Brick* case followed the earlier decision of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In the *Hanover Shoe* case, the defendant, accused of monpolizing shoe machinery, attempted to defend against this charge by asserting that plaintiff was not injured by any acts committed by the defendant because the plaintiff, a shoe manufacturer, passed the additional costs along to the ultimate consumer. The Supreme Court rejected this pass-on or pass-through doctrine as a defense which could be asserted in an action for treble damages under § 4 of the Sherman Act, 15 U.S.C. § 4. The Supreme Court based its holding on the difficulties and uncertainties of proof concerning such a defense when it stated:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher prices had the overcharge been

> discontinued. Since establishing the applicability of the pass-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.

Hanover Shoe v. United Shoe Mach., supra, 392 U.S. at 492-493.

Additionally, the Court was concerned about the antitrust laws losing their effectiveness if such a defense were allowed. If this defense was carried to the extreme, the only possible plaintiffs would necessarily be the ultimate customers who in the instances in *Hanover Shoe,* were buyers of single pairs of shoes. Since such individuals would only have a tiny stake in a lawsuit and, therefore, little interest in it, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one would be available to bring and prosecute vigorously any class action against them. *Id.* at 494.

In *Illinois Brick,* the Court was faced with the choice of either carving out an exception to *Hanover Shoe,* or disallowing the use of the pass-on doctrine both offensively and defensively. In disallowing its use, offensively and defensively, the Court noted that "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model,' 392 U.S., at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick Co. v. Illinois, supra,* 431 U.S. at 731-732. The Court went on to find that "the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of

distribution." *Id.* at 732. Thus, the evidentiary complexities of the pass-on doctrine where one could become mired in a determination of how much damage to apportion to each purchaser in a long chain of distribution, led the Court to reject the offensive use of this doctrine. Additionally, the Court was concerned with exposing defendants to multiple liability if the pass-on doctrine were allowed to be used offensively, but not defensively, because in such a situation, each purchaser in the chain of distribution could recover the full measure of his own injury, and damages, as well as the injury and damages of each purchaser below him, and yet the defendant could not offset the recovery of the first purchaser against the recovery of the second purchaser, or the recovery of any subsequent purchaser against any recovery of further subsequent purchasers, or *vice versa*. *Id.* at 730-731.

The Court was also concerned about the problems of joinder inherent in such a situation, such as impossibility of joinder, frustrating attempts at class actions, difficulties in properly apportioning recoveries, and other inherent problems. *Id.* at 737-741.

The Court did recognize that there may be instances where an indirect purchaser could be a proper plaintiff. A preexisting cost-plus contract was cited as such an exception to the Court's opposition to application of the pass-on doctrine. The interaction of supply and demand would not complicate the damage determination in such a situation since the indirect purchaser would be tied to a fixed quantity with the overcharge being directly passed on. *Id.* at 736. The Court also recognized that another situation where the pass-on doctrine might be allowed is where the direct purchaser is owned or controlled by its customer. *Id.* at 736 n.16.

In the present action, plaintiff does not even allege that it is a direct purchaser, and it is clearly an indirect purchaser.

Plaintiff, however, asserts that it falls into the exceptions of *Illinois Brick* and has the right to maintain the action for damages. Plaintiff attempts to support this assertion based on three theories: (1) that certain Federal pass-through regulations are analogous to the cost-plus contract; (2) that domestic oil companies have conspired with the defendants; and (3) that the defendants control the United States oil companies with which plaintiff deals.

The two primary features of the cost-plus contract which led the Court to cite this as a possible exception to *Illinois Brick* are: (1) a direct and easily measurable pass-on of costs; and (2) a commitment for a fixed quantity, precluding evidentiary complexities due to considerations of decreasing sales. The Federal pass-through regulations upon which plaintiff relies have neither of these characteristics. Plaintiff alleges that consumer prices for gasoline directly reflect any price increase by the OPEC nations, based on the pass-through statute, 15 U.S.C. § 753(b) (2),[7] which allows a dollar-for-dollar pass-through of net increase in the cost of crude oil. Plaintiff's exhibits in support of its motion for preliminary injunction, however, irrefutably establish that the actual pass-through is accomplished in a banking mechanism. The oil companies 'bank' these pass-throughs until such time, as they believe, the market will allow an increase in the price of gasoline. The pass-through, if it occurs at all, is not direct and is not easily measurable. Furthermore, consumers are not required to buy a fixed quantity of gasoline. Consequently, evidentiary problems much the same as in *Illinois Brick* could and most surely would arise. Therefore, this pass-through statute and the regulations of the Department of Energy thereunder, 10 C.F.R. 212.83, pp. 277-290 (1978), are not in any way analogous to a true cost-plus contract and cannot serve as an exception to *Illinois Brick*.

Plaintiff's contentions with respect to conspiracy with "certain private companies and other entities" (Plaintiff's First Amended Complaint, par. 24, page 11, lines 15-21), and control of them by the OPEC countries are equally frivolous. While plaintiff does allege a conspiracy in its complaint, the allegation is extremely general and vague. Plaintiff utterly fails to allege any facts to support a conspiracy charge, and does not even name any domestic oil companies as engaging in any such conspiracy, or being controlled in any way by OPEC or its members. Furthermore, plaintiff's complaint contains absolutely no allegations concerning control. Moreover, no evidence of any kind was adduced at the hearings and trial to show any kind of such conspiracy or control. Consequently, these contentions must fall.

The Court, therefore, must and does strike and dismiss from the First Amended Complaint the prayer for damages.

2. *Injunctive Relief*

Aside from seeking damages, plaintiff has prayed the Court to enjoin the defendants for continuing to conspire to fix prices. This claim is based on Section 16 of the Clayton Act, 15 U.S.C. § 26, which states in part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damages granted by courts of equity. . . .[8]

While the Supreme Court has spoken clearly and definitively concerning an indirect purchaser's right to seek damages in *Illinois Brick*, the Court has not made a definitive state-

ment concerning the right of an indirect purchaser to seek injunctive relief. Both *Illinois Brick* and *Hanover Shoe* involved damage actions only, and the Supreme Court limited its ruling to the question of damages. Thus, whether an indirect purchaser may properly seek injunctive relief for an antitrust violation remains an open question.

In *Mid-West Paper Products Company v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), the Court of Appeals for the Third Circuit held that *Illinois Brick* and *Hanover Shoe* do not preclude an indirect purchaser from seeking injunctive relief. The Court based this holding on the finding, at 590, that

> in contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations — such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses — that the Supreme Court emphasized when limiting the availability of treble damages.

In support of this ruling the Court draws a distinction between Section 4 of the Clayton Act (15 U.S.C. 15) which provides for damages for any person who shall be injured by conduct in violation of the antitrust laws, and Section 16 (15 U.S.C. 26) which allows injunctive relief against threatened loss or damage. The Court went on to state that

> for purposes of § 16 the complainant "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur". . . .
> *Id.* at 591 (footnote omitted).

This distinction between the plaintiff's obligation to show that he has actually been injured under Section 4, and plaintiff's obligation to show only threatened injury under Section 16, led the Court to conclude that

> the test for standing under Section 16 has been framed in terms of a proximate cause standard that is "less constrained" than that under § 4 and which might in fact be no more rigorous than the general rule of standing.
>
> *Id.* at 591-592 (footnotes omitted).

The Court also showed concern for plaintiffs that have obviously been damaged yet have been foreclosed from seeking relief, and additional concern for the enforcement mechanisms of the antitrust laws if these plaintiffs should be completely barred from seeking redress. *Id.* at 593.

A suit for injunctive relief does not present many of the problems that led the Court in *Illinois Brick* to preclude indirect purchasers from seeking damages. For instance, as stated in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972), "100 injunctions are no more effective than one." Thus the multiplicity of suit problem does not exist in the context of Section 16, injunctive relief. The remedy of an injunction does not give rise to recovery of a fund from which a Court would have the impossible task of attempting to apportion the recovery among a long line of indirect purchasers on a chain of distribution. Accordingly, some of the evidentiary and joinder problems that perplexed the Court in *Illinois Brick* are not present in an injunctive action. This is not to say, however, that all the evidentiary problems are nonexistent. The dynamics of the marketplace could still lead to extremely complex and complicated evidentiary problems in determining whether an indirect purchaser has been injured by the prohibited action. Counterbalanced against this possible difficulty of proof, however, is the recognition that should the indirect purchaser be precluded from seeking injunctive relief, he would be totally without any remedy for an injury that is many times all too real. In view of the desire of Congress for effective enforcement

procedures under the antitrust law, this Court does not believe that Congress intended to totally exclude such a large class of potential plaintiffs from the protection of the antitrust laws. Accordingly, this Court agrees with the *Mid-West Paper* decision and concludes that an indirect purchaser may sue for injunctive relief under the antitrust laws. But this does not end the matter in some way favorable to plaintiff because we must look for and find jurisdiction if plaintiff is to prevail.

JURISDICTION

Subject matter jurisdiction is granted to the district courts to hear actions against foreign states under 28 U.S.C. § 1330(a).[9] As explicitly provided by this statute, however, district courts only have jurisdiction to hear such actions when the foreign state is not entitled to immunity. Consequently, the question of sovereign immunity has been given jurisdictional status by its express inclusion in this statute and must be the first question addressed by this court in determining whether this Court has been presented evidence satisfactory to support its jurisdiction to grant plaintiff's claim for relief.[10]

Sovereign immunity is a doctrine of international law under which domestic courts must refrain from asserting jurisdiction over a foreign state. This doctrine was first recognized in the case of *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). Until recently, when a foreign state wished to assert immunity, it would request the Department of State to make a formal suggestion of immunity to the court. The courts had begun to rely quite heavily on the practices and policies of the State Department and to place less emphasis on whether immunity was supported by the law and practice of nations, that is, international law.

The theory of absolute sovereign immunity initially predominated all judicial discussion and decision. Under this

theory, a foreign state could not be sued whatsoever without its consent. But as the law evolved in this area, a restrictive theory of immunity began to gather growing support. Under the restrictive theory, foreign states and sovereignties are not immune insofar as their commercial activities are concerned. This theory was first stated as United States policy in 1952 in a letter ("the Tate Letter") from the Acting Legal Advisor of the Department of State, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman:

> . . . . [T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). 26 Dep't State Bull. 984 (1952).

In 1976, Congress enacted the Foreign Sovereign Immunities Act. The legislative history is clear that the Act codified the restrictive theory of sovereign immunity. Additionally, a principal purpose of this act was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch thereby . . . assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." House Report No. 94-1487, p.7, 5 U.S.C. Cong. Ad. N. (1976) 660. After the enactment of FSIA, any claim of sovereign immunity must be decided in conformity with principles set forth in this act. 28 U.S.C. § 1602.

Under it, the FSIA, foreign states are granted immunity from the jurisdiction of American courts subject to certain exceptions. 28 U.S.C. § 1604.[11] The only exception to immunity upon which plaintiff relies provides that foreign states are not immune in any case:

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state

> elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and the act causes a direct effect in the United States. 28 U.S.C. § 1605(a) (2).

Accordingly, for this court to have subject matter jurisdiction the defendant must show that the activities engaged in by the defendant are "commercial activities."

As shown by the evidence, the pricing mechanism used by the member nations involves mutual agreement on what is called the "government take." The government take is the amount of money the government will receive for each barrel of oil extracted within its borders and sold. Initially, each of the OPEC member sovereignties received this "take" by levying a tax on the foreign company extracting the oil or by charging the foreign company a royalty for the oils extracted. As each country gained a greater proprietary interest in the company extracting the oil, a greater amount of the "take" was derived from "buyback," a term used to signify the amount a foreign state receives through the ownership, partial or total, of the company extracting and selling the crude oil. Today, the "government take" is accomplished and maintained by taxation and direct price quotation and demand, supported by production controls, sometimes euphemistically referred to as "conservation."

While price-fixing is the more publicized aspect of the crude oil activities carried on by the OPEC countries, it is not the heart of the pricing mechanism for crude. The foundation of these activities is the ability and willingness to control production of crude oil. As testified by the preeminent expert in the field of World Petroleum Economics, Dr. Morris A. Adelman, one of the two Court appointed experts:[12]

> Control of supply is the essence of monopoly; price fixing the result . . . . [T]he OPEC nations can raise

> or lower prices at will by controlling output. Most of the [crude] oil] price increases since 1970 have in fact resulted from output restriction. Prices have also been raised by taxation and by direct price quotation. These two methods are convenient, but not necessary. Court Exhibit 26, Statement of M.A. Adelman. pp. 1, 12-13.

In order to determine whether these activities are "commercial activities," the Court must once again return to the FSIA for guidance. Section 1603(d) defines "commercial activity" as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its purpose. (Emphasis added.)

The legislative history in the House Report elaborates, referring to a foreign state's commercial acts as "those which private persons normally perform," and "of the same character as . . . might be made by a private person." House Report No. 94-1487, at pp. 14, 16, 5 U.S.C. Cong. Ad. N. (1976), 6613, 6615. If the activity is one which normally could be engaged in a private party, it is a commercial activity and the foreign state is not entitled to immunity. House Report No. 94-1487 at 16, 5 U.S.C. Cong. Ad. N. (1976) 6615. If the activity is one in which only a sovereign can engage, the activity is noncommercial.

These standards are somewhat nebulous, however, in the context of a particular factual situation. As discussed by counsel for *Amicus Curiae*, Indonesia-U.S. Business Committee for the Indonesian Chamber of Commerce, the determining factor is how the court defines the act or activity.

An act or activity can be defined broadly, such as "hiring of employees," an activity carried on by private parties, and thus, "commercial," or it can be defined narrowly, such as, "employment of diplomatic, civil service or military personnel," a governmental activity. It was suggested that in determining whether to define a particular act narrowly or broadly, the court should be guided by the legislative intent of the FSIA, to keep our courts away from those areas that touch very closely upon the sensitive nerves of foreign countries.

This Court agrees that this "commercial activity" should be defined narrowly. This determination, while based partially on the factor mentioned above, is premised primarily on the recognition that a court must base its ruling on specific facts. By basing a ruling on a *generalized* view of the evidence, a court may be basing its ruling on half-truths. This Court is required to make its ruling upon the *specific* evidence presented in the evidentiary hearings and trial. From the evidence presented to this Court, it is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource — to wit, crude oil — from its territory.

In determining whether the activities of the OPEC members are governmental or commercial in nature, the Court can and should examine the standards recognized under international law. The United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources. *See, e.g.*, Resolution 1803, G.A. Res. 1803, § I(1), 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R 850 (1962):

> *Bearing in mind* its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sov-

> ereign right of every State to dispose of its wealth and its natural resources should be repected,
>
> *Considering* that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and in respect for the economic independence of States,
>
> . . .
>
> *Declares* that;
>
> 1. The right of people and nations to permanent sovereignty over their national wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.[13]

Accord, Charter of Economic Rights and Duties of States, G.A. Res. 3281, Ch. II, Art. 2(1), U.N. Doc. A/RES/3281 (XXIX) (1974); Declaration on the Establishment of a New International Economic Order in 1974, G.A. Res. 3201 (S-VI), § 4(e), D.N. GAOR, 6th Spec. Sess., Supp. (No. 1) 3, U.N. Doc. A/9559; Resolution 3171, G.A. Res. 3171, 28 U.N. GAOR 30 (Vol. 1) at 52, U.N. Doc. A/9030 (1973); Resolution 3016, G.A. Res. 3016, Preamble and § 1, 27 U.N. GAOR, Supp. (No. 30), U.N. Doc. A/8730; Resolution 2158, G.A. Res. 2158, § 1, 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966). The United States' endorsement of this principle derives from its control, as a sovereign, of the development of its own lands and resources. *See, e.g.*, U.S. Constitution, Art. 4, Sec. 3, Cl. 2.

The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. The defendants' control over their oil resources is an especially sovereign function because oil,

as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples. As stated by Dr. Adelman:

> It is difficult or impossible to separate the OPEC governments as governments from their role as oil producers. They began their price fixing role by levying taxes on foreign companies operating within their borders. The oil revenues are the great bulk of governmental revenues. Indeed for the OPEC nations supplying most of the oil, the oil revenues are the great bulk of the whole national product. Court Exhibit 26, Statement by M.A. Adelman, p. 9.

We need not look beyond our own borders for examples of a government taking a determinative role in the marketing of its wealth and natural resources. *Parker v. Brown*, 317 U.S. 341 (1943), involved an antitrust challenge to a California state program which controlled the marketing of raisins grown in the state, so as to restrict competition among the growers, and maintain prices. According to the defendants in that case, (California officials), the activity was for the benefit and protection of the public welfare. The Court, in reversing the grant of injunctive relief to plaintiff, held that the program was "an act of government," *Id.* at 352, and reasoned:

> [I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command. *Id.* at 350.

Similar activity has been carried on by other States and the Federal Government in this country. The discovery of the East Texas Oil Field in the early 1930's led to distressing conditions in the crude oil industry. This new oil became

a drug on the market and was being sold for as little as 10 cents a barrel in Texas, at a time when the price throughout the country had soared to more than $3.00 a barrel. The State of Texas and other States, had, in order to prevent waste, and to conserve their natural resources, passed certain statutes and imposed restrictions requiring proration and limiting the quantities that could be taken from the wells in various fields. The Federal Connally Hot Oil Act, 49 Stat. 30, 15 U.S.C. § 715, *et seq.*, was enacted by the Congress to enforce the state statutes, by prohibiting the shipment in interstate commerce of crude oil produced in violation of state laws and regulations. United States v. Brumfield, 85 F. Supp. 696, 699 (W.D. La. 1949). Thus, certain States in the United States have restricted production of crude oil in order to maintain and stabilize prices and, thereafter, the Federal Government not only acquiesced in this activity, but made the States' acts effective by the assistance of Federal law enforcement.

In view of our own State and Federal domestic crude oil activities, there can be little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity.[14] Plaintiff, however, asserts that, while this may be true, the actions of the OPEC nations in coming together to conspire to fix prices is commercial and, thus, not immune. Plaintiff's position, however, is untenable. It is ridiculous to suggest that the essential nature of an activity changes merely by the act of two or more countries coming together to agree upon how they will carry on that activity. The action of sovereign nations coming together to agree on how each will perform certain sovereign acts can only, itself, be a sovereign act. The act derives its authority and efficacy from the command

of the sovereign nation and is not intended to operate or become effective without that command.

In view of all the evidence presented, this Court finds that the activity carried on by the defendant OPEC member nations is *not* "commercial activity;" that, therefore, defendants are entitled to immunity under 28 U.S.C. § 1604; and that, consequently, this Court lacks subject matter jurisdiction under 28 U.S.C. § 1330(a).

And, since this Court lacks subject matter jurisdiction, it also lacks personal jurisdiction, as mandated by 28 U.S.C. § 1330(b).[15]

In concluding this phase of our decision, it is instructive and helpful to note that the United States Government itself has implicitly recognized the activities of the OPEC member nations to be *sovereign* activities in connection with the production and marketing of crude oil, when the United States entered into consent decrees with the so-called "Big Seven" or "Seven Sisters" — the 7 largest American oil companies doing business with the OPEC member nations. These consent decrees entered into on November 14, 1960, for a period of 25 years until November 14, 1985 in the Department of Justice Antitrust Division Case No. 1163, grant specific "exceptions" and "permissive provisions" allowing these American companies to engage in price fixing, production control and market allocation programs for crude oil when required to do so by the law of any foreign nation, specifically the sovereignties which later organized and became members of OPEC, and which are defendants herein. *United States v. Standard Oil Co. (New Jersey)*, 1960 CCH Trade Cases ¶ 69,849, p. 77,335, S.D.N.Y. Civil Action No. 86-27 (Nov. 14, 1960); *United States v. Gulf Oil Corp.*, 1960 CCH Trade Cases ¶ 69,851, p. 77,344; S.D.N.Y., Civil Action No. 86-27 (Nov. 14, 1960).

FOREIGN SOVEREIGNTY CANNOT BE DEFENDANT IN ANTITRUST ACTION

Even if subject matter jurisdiction did exist, dismissal of the complaint would still be necessary and appropriate. Section 1 of the Sherman Act provides in part that "[e]very *person* who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . ." (Emphasis added.[16]) Any person guilty of such a felony is subject to liability for treble damages. 15 U.S.C. § 15. It is apparent from the statutory language that plaintiff is entitled to relief in the instant action only if the defendants are "persons" as that term is used in section 1.

Section 8 of the Sherman Act, 15 U.S.C. § 7, and Section 1 of the Clayton Act, 15 U.S.C. § 12, define "person" or "persons," "to include corporations and associations existing under or authorized by the laws of the territories, the laws of any State, or the laws of a foreign country." This statutory language does not support the conclusion that foreign sovereigns are "persons" subject to Sherman Act liability. The case law accords with this interpretation.

In *Parker v. Brown, supra,* 317 U.S. 341 (1943), the Supreme Court held that a domestic State is not a person who may be sued under the antitrust laws. The Court reasoned, at 351:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to "persons" including corporations (§ 7), and it authorizes suits under it by persons and corporations (§ 15). A state may maintain a suit for damages under it, *Georgia v. Evans,* 316 U.S. 159, but the United States may not sue for damages, *United States v. Cooper Corp.,* 312 U.S. 600 — conclusions

> derived not from the literal meaning of the words "person" and "corporation" but from the purpose, the subject matter, the context and the legislative history of the statute.
>
> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monpolize by *individuals and corporations*, abuundantly appears from its legislative history. (Emphasis added.)

These same considerations apply with equal force to foreign nations.[17]

In *Hunt v. Mobil Oil Corp*, 550 F.2d 68, 78 n.14 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977), the court concluded that foreign sovereigns are not "persons" subject to Sherman Act liability. Plaintiff in that case alleged *inter alia*, that certain private party defendants had entered into anticompetitive agreements with the government of Libya. Though Libya was not named as a defendant, the Second Circuit considered Libya's liability under the Sherman Act and held that "Libya cannot be guilty of a Sherman Act violation . . . because it is not a person or corporation within the terms of the Act but a sovereign state."

A similar conclusion is found in *Interamerican Refining Corporation v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970), where the court held that "[t]he Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations." (footnote omitted). Later the court added: "The Sherman Act refers only to persons, not to states or nations, and both

the Act and the Constitution would be badly misinterpreted to permit liability for acts of a sovereign." *Id.* at 1298 n. 18.

Plaintiff has asserted that this *stare decisis* precedent has been altered by the FSIA. Plaintiff relies on a reference contained in the Legislative History of the FSIA, House Report No. 94-1487, p. 19, 5 U.S.C. Cong. Ad. News (1976) 6618, which provides:

> Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(e) is intended to alter the application of the Sherman Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913) or *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 803 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969). (footnotes omitted.)

Neither of the cases cited in the legislative history however, supports a conclusion that a foreign nation may be sued for violating our antitrust laws. *United States v. Pacific & Arctic Co., supra,* involved an alleged conspiracy between American and Canadian carriers [not foreign sovereignties or nations] to monopolize certain transportation partly within and partly without the United States. Since this action was brought under our Federal Antitrust laws, a crucial question in this case was the extraterritorial reach of our domestic laws. The Court held that our laws did apply. Basic to the Court's reasoning was that the monopoly consisted of

> control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens

> and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations. 228 U.S. at 106.

The other case, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., supra*, arose from an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping. This case, just as the *Pacific & Arctic* case, did not involve a foreign sovereign, even tangentially. Congress was chiefly concerned with the continuing effectiveness of these two cases when it referred to the applicability of the Sherman Act to "any defendant." Since, in neither of these cases, was there any attempt to assert jurisdiction over a foreign state, Congress' concern cannot be interpreted to authorize a judicial assertion of jurisdiction over a foreign state for violation of our antitrust laws.

In addition, the language in the legislative history clearly tells us that the FSIA was not intended to alter the application of the Sherman Act. Prior to the enactment of the FSIA, the only definitive statement on this point was the holding in *Interamerican Refining Corp., supra*, 307 F. Supp. 1291 (D. Del. 1970), that foreign nations are not "persons" who may be sued.

Therefore, this Court in this OPEC case is still bound by all the precedents to hold that the foreign sovereignties cannot be made defendants here, despite a recent Supreme Court decision allowing a foreign sovereignty to be an antitrust plaintiff.

In *Pfizer Inc. v. India*, 434 U.S. 308 (1978), the Supreme Court held that a foreign nation may be a "person" under our antitrust laws as a plainfiff for the purpose of bringing suit. The determining factor in the result reached by the Court was that it did not "require the Judiciary in any way to interfere in sensitive matters of foreign policy." 434 U.S.

at 319. To include foreign nations within the ambit of "persons" who may be sued as defendants, however, would require judicial interference in sensitive foreign policy matters.[18] Since Congress has never indicated any intent to extend liability of the Sherman Act to actions of a foreign sovereign, and since the accepted doctrine is that "questions of 'general policy'—especially with respect to foreign sovereigns and absent explicit legislative authority—are beyond the province of the Judicial Branch," *Id.* at 330 (Powell, J., dissenting), this Court must refrain from extending the *Pfizer* ruling beyond the strict confines of that case.

Therefore, a foreign nation may sue, but not be sued, under the United States antitrust laws[19] and, perforce, the Court is compelled here to dismiss the entire action against the defendants, members of OPEC, because they cannot be made defendants herein in this antitrust suit and no valid claim for relief can be alleged or proved against them.

NO PROXIMATE CAUSE, NO INJUNCTIVE RELIEF

Even if the activity of the OPEC nations were not sovereign and governmental in nature and even if a foreign state could be sued under the American Antitrust Laws, the evidence adduced at trial does not support the granting of an injunction. Plaintiff failed to show the requisite causal connection between the alleged injury (rise in domestic gasoline prices) and the alleged anticompetitive conduct (price fixing of OPEC crude oil prices). The evidence clearly demonstrated that the dramatic rise in prices in 1973-1974 and in 1978-1979 was primarily caused by factors other than a rise in the crude oil.

While plaintiff in an injunctive action under § 16 is required to show only threatened loss or damage, this damage must be proximately caused by the alleged anticompetitive actions of the defendants. *Mid-West Paper Products Co.*

v. Continental Group, 596 F.2d 573, 590 (3d Cir. 1979); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1174 (5th Cir. 1976); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975); *Reibert v. Atlantic Richfield Company*, 571 F.2d 727, 731 (10th Cir. 1973). In order to demonstrate that the injury or damage was proximately caused by defendants' anticompetitive conduct, the plaintiff must demonstrate by a preponderance of the evidence that: (1) the alleged prohibitive conduct of OPEC was a substantial factor in the occurrence of any injury or damage to IAM; and (2) the plaintiff is engaged in activities intended to be protected by the American antitrust laws. *Reibert v. Atlantic Richfield Company, supra*, at 731. Plaintiff here (IAM) has utterly failed to meet the first of these two tests.

Plaintiff alleges that it has been damaged because it had to pay higher domestic gasoline prices by reason of the higher foreign OPEC crude oil prices attributable to the price fixing activities of the defendants, members of OPEC. Particularly, plaintiff alleges that the OPEC crude oil price hikes in 1973-1974 and in 1978-1979 resulted in higher domestic gasoline prices and were responsible for injury to plaintiff. Therefore, in order for the plaintiff to satisfactorily demonstrate causation, plaintiff must prove that the crude oil price increases were a substantial factor in the occurrence of the gasoline price hikes.

Dramatic gasoline price increases and dramatic crude oil price hikes did in fact occur during these two time periods, 1973-1974 and 1978-1979. Mere approximation of occurrence, however, does not demonstrate causation, in and of itself. Plaintiff is required to present specific evidence satisfactory to the Court to establish this causation. 28 U.S.C. § 1608(e). This, plaintiff has failed to do. Rather the evidence clearly and convincingly shows that the increase of domestic gasoline prices during these time periods was not

the proximate result of increase in foreign OPEC members crude oil prices.

Domestic gasoline prices of late have principally been the result of a shortage of refinery capacity, Department of Energy allocation regulations, and shortages in crude oil at domestic refineries in 1973 and 1979. Federal regulations have also greatly discouraged refiners from adding much needed refining capacity. The quota required by the Mandatory Oil Import Program discouraged construction of additional refining capacity between 1958 and 1973. After 1973, Federal Energy Administration regulations promulgated under authority granted in the Emergency Petroleum and Allocation Act discouraged refiners from adding to refinery capacity by preventing them from recovering the incremental or marginal costs of the additional capacity. These margins had been essentially frozen at their nominal 1973 levels.

At the same time these Federal regulations were restricting the expansion of refining capacity, other Federal regulations were reducing the supply of gasoline. Two regulations promulgated by the Environmental Protection Agency, one prohibiting use of the additive MMT in unleaded gasoline and the other reducing the level of lead in gasoline, have both resulted in reduced production and availability of domestic gasoline.

In the context of this already restrained supply situation, an unexpected surge in domestic gasoline consumption in the latter half of 1978 significantly contributed to increased domestic gasoline prices. This unexpectedly high level of fourth quarter consumption caused refiners to reduce inventories below planned levels and thus further induced gasoline price increases. Ordinarily the loss in inventories could have been made up by increased utilization of refineries. Reduction in Iranian production (completely unre-

lated to any price fixing activities), however, decreased the world supply of crude oil, reduced the amount of crude oil available to the United States, and prevented refiners from operating refineries at a level which would have enabled them to rebuild the reduced inventories. This lower level of inventories of domestic gasoline then substantially contributed to higher prices.

During this time of reduced availability of domestic gasoline due to lack of sufficient refining capacity and reduction of crude oil supply, additional Federal regulations increased the severity of this shortage. The Department of Energy promulgated a series of regulations for the allocation of petroleum products during a period of shortage which established a series of priorities for different types of users and established certain set aside requirements for government supply of gasoline. Because of the compulsory requirement of supplying "priority" customers and the necessity to hold aside the "set aside" gasoline under these regulations, many filling stations received only 80% of the gasoline they had received the year before. Thus, as soon as a crisis developed, both the Federal Department of Energy and various State energy offices stepped in to turn a small shortage into a large and horrendous shortage. The result was excessive price increases and long lines at domestic service stations. These increases in domestic gasoline prices once again demonstrate that Federal regulation of the petroleum market has posed a greater threat to the American consumer than any other single factor.

As can readily be seen, the rise in OPEC members' foreign crude oil prices was not a substantial factor in the rise of domestic gasoline prices. In fact, some respected economists believe that the increased domestic gasoline prices actually caused the rise in OPEC members' foreign crude oil prices. The increase of these crude oil prices occurred

only after the gasoline price hikes. These hikes along with the Federal and State systems of controlled allocations created a climate where spot prices of foreign and even domestic petroleum were inevitably bid up. These higher prices on petroleum product markets signaled foreign crude oil exporters that the market would support higher crude oil prices. As made clearly evident by this cause and effect relationship, the rise in foreign crude oil prices, including those of OPEC members, was not a substantial factor in the increased prices of domestic gasoline, and therefore was not the proximate cause of plaintiff's injury in, like the general public, being forced to pay higher prices for domestic gasoline.

Even if plaintiff had been able to demonstrate that the increases of foreign OPEC members' crude oil prices was a substantial factor in the general rise of domestic gasoline prices, proximate cause could not have been shown without more specific evidence. Plaintiff was not maintaining and could not maintain, this action on behalf of the general public or the average American consumer. Rather the action here is necessarily being brought and maintained by a specific plaintiff (IAM), with the result that proximate cause must be established to connect the alleged prohibited conduct of the OPEC members in raising foreign crude oil prices to the specific injury allegedly suffered by plaintiff, IAM, in paying higher domestic gasoline prices. Here, plaintiff did not even attempt to establish that the domestic gasoline it purchased was the product of any of the crude oil purchased from one of the defendant members of OPEC. All this Court could do is engage in nebulous speculation as to whether plaintiff was a purchaser of gasoline manufactured from defendants' product, in any way at all. Once

again, proximate cause has not been established by the plaintiff and the Court must deny plaintiff's prayer for injunctive relief.

NO DEFAULT JUDGMENT AND NO WAIVER

Under 28 U.S.C. § 1608(e) the Court cannot enter a default judgment automatically upon failure or refusal of a foreign sovereign to appear after being served as required by the Foreign Sovereign Immunities Act. The Court, as previously pointed out in the Order to Show Cause (Appendix A), and in the "Introductory" hereinabove at page 4, must conduct a full and complete hearing to determine if the plaintiff [claimant] has established "his claim or right to relief by evidence satisfactory to the Court." This was one of the reasons the Court consolidated the full trial of the Final Injunction and hearing upon the Preliminary Injunction with this hearing on Default Judgment, and heard all relevant evidence. The Court is convinced that plaintiff did not carry its burden of showing by a preponderance of the evidence that it was entitled to any relief. *A fortiori*, this Court cannot and will not enter any Default Judgment against any of the defendants.

Since no Default Judgment is entered here against any of the defendants, there is no waiver by defendants of their sovereign immunity, nor do they admit any of plaintiff's allegations concerning such sovereign immunity, each Defendant's sovereignty, or that the defendants' activities with OPEC concerning crude oil prices are in any way "commercial activities."

CONCLUSION

The Court should not conclude this discussion without reaffirming its admiration of plaintiff and its counsel for bringing this action, a commendation already stated by the Court at trial. In this suit, plaintiff has brought public at-

tention in the United States and throughout the World to the frustration and anger all American gasoline consumers must feel about increasing domestic gasoline prices as a large part of the increasing costs of energy, a frustration in great part due undoubtedly to their own inertia and unjustified reliance on Federal and State bureaucracy. The Federal Executive Branch, through its Cost of Living Council and regulations, its Federal Energy Administration and Emergency Petroleum Allocations, its Department of Energy and accompanying maze of enigmatic and incomprehensible regulations, along with inept State interventions, has helped to create the energy crisis, has helped to intensify this crisis, and has utterly failed to resolve it, through inaction and ineffective action, as illustrated by the domestic gasoline price increases and long service station lines. When the Executive Branch so completely falters in its handling of an obvious and major problem, it is extremely tempting for the Court to take the initiative. However, we must recognize that we are a court of limited jurisdiction with the ability to handle problems only within the confines of the law and only within the power granted to this Court by Congress. Through its Order to Show Cause of June 25th, the Court endeavored to give the Executive Branch *every* opportunity to assist the Court in its handling of this matter. The Executive Branch, however, remained silent, perhaps hoping this storm would blow over.

With the persistent initiative of plaintiff, aided by the outstanding *amicus curiae* briefs and through oral argument submitted on behalf of plaintiff by Richard A. Fine, Esq., and S.C. Yuter, Esq., *in propria persona,* and submitted by Latham and Watkins and Antonin Scalia, Esq., on behalf of *amicus,* Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry, and by Holmes and Warden, and Khalid Abdullah Tarig Al Man-

sour, Esq., and Faisal Bin Fahad Al Talal, Esq., on behalf of *amicus*, Concerned Black Americans In Support of Africa and the Middle East, the Court has been able to arrive at a just and legally unassailable position here. While this action must be dismissed, the storm and crisis still exist and will not be resolved through inaction. It is only to be hoped that the Executive Branch as the Federal Governmental leader in the field of Foreign Relations, as well as domestic and international Energy, will now take over and bring appropriate relief to the American consumer in the entire field of Energy, and particularly in foreign as well as domestic crude oil prices and domestic gasoline prices. To do less, or to put the burden back on the Judicial branch again is intolerable.

This Court may only act where Congress has given it power to act. For purposes of asserting jurisdiction over a foreign sovereign, Congress has given this Court power to act only when the sovereign does not have immunity from suit. Here the sovereign does have immunity from suit because the activity of which plaintiff complains is, by its nature, sovereign and governmental. There being no waiver, express or implied, of this immunity by the defendant nations, the Court is powerless to act.

Even if the Court did have jurisdiction to act, the defendant nations could not be held accountable for their activities under American antitrust laws. Foreign nations are not persons who may be sued under the American antitrust laws. While the Supreme Court did recently hold that foreign nations may bring suit for violations of American antitrust laws, this Court will not extend this ruling in the absence of a clear Congressional mandate changing the antitrust laws so as to permit the joining of a sovereign state as a defendant.

Plaintiff also failed on the merits. The requisite proximate cause was not established by evidence satisfactory to the

Court. The causal connection between the alleged violation and the alleged injury was not shown *generally*, because the evidence revealed that the principal determinants of the price of gasoline were other than the rise of crude oil prices. Neither was this causal connection shown *specifically*, because the plaintiff failed to establish through specific evidence that it was a buyer, directly or indirectly, of crude oil which originated from any of the defendant nations.

As a result, this Court has no alternative but to terminate this action in favor of the defendants and against the plaintiff, and the Complaint and First Amended Complaint must be dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The Clerk of Court is ordered to file the original and serve copies of this Memorandum of Decision and Order of Judgment for Defendants forthwith upon plaintiff and its counsel, upon all *amici curiae* and their counsel who have appeared herein, and upon each of defendants through the Secretary of State to the attention of the Director of Special Consular Services, Washington, D.C. 20520, all by regular mail.

Dated: September 18, 1979

A. ANDREW HAUK
United States District Judge

FOOTNOTES

Footnote* **Reference Page A2**

Briefs of *amici curiae* urging granting of the injunction were filed by Joel D. Joseph, Esq., Washington, D.C., and Daniel J. Popeo, Esq., Washington, D.C., for the Washington Legal Foundation, Washington, D.C.; By Congressman Jim Leach, Washington, D.C., *in pro per* with general agreement by Congressman Tom Railsback, Washington, D.C.; by Public Advocates, Inc., San Francisco, California, by Angela Glover Blackwell, Esq., San Francisco, California, and Robert L. Gnaizda, Esq., San Francisco, California, for American-G.I. Forum; by Simpson, Thacher & Bartlett, New York, New York, by Donald Oresman, Esq., for Gulf & Western Industries, Inc.; by Attorney General Carl R. Ajello, Esq., Hartford, Connecticut and Assistant Attorney General John R. Lacey, Esq., Hartford, Connecticut, for the Attorney General's Office of the State of Connecticut;

An additional joint Memorandum of Law urging the Court not to dismiss the case was filed by Charles A. Graddick, Attorney General for the State of Alabama, Montgomery, Alabama; Avrum M. Gross, Attorney General for the State of Alaska; Robert K. Corbin, Attorney General for the State of Arizona; Carl R. Ajello, Attorney General for the State of Connecticut; Jim Smith, Attorney General for the State of Florida; Tom Miller, Attorney General for the State of Iowa; Robert T. Stephan, Attorney General for the State of Kansas; Warren Spannaus, Attorney General for the State of Minnesota; Paul L. Douglas, Attorney General for the State of Nebraska; Richard H. Bryan, Attorney General for the State of Nevada; Allen I. Olson, Attorney General for the State of North Dakota; James A. Redden, Attorney General for the State of Oregon; William M. Leech, Jr., Attorney General for the State of Tennessee; Mark White, Attorney General for the State of Texas; Slade Gorton, Attorney General for the State of Washington; Bronson C. LaFollette, Attorney General for the State of Wisconsin; and Chauncey H. Browning for the State of West Virginia.

Footnote 1 **Reference Page A3**

15 U.S.C. § 1 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or con-

spiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Footnote 2 **Reference Page A3**

See, Albrecht v. Herald Co., 390 U.S. 145 (1968) *reh. den.* 390 U.S. 1018; *United States v. General Motors*, 384 U.S. 127 (1966); *Northern Pac. R. Co. v. United States*, 356 U.S. 1 (1958); *United States v. McKesson & Robbins*, 351 U.S. 305 (1956); *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951), *reh. den.* 341 U.S. 956; *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328 (9th Cir. 1972); *Local 36 of Intern. Fishermen & Allied Workers of America v. United States*, 177 F. 2d 320 (9th Cir. 1949).

Footnote 3 **Reference Page A3**

The *per se* category of antitrust violations is made up of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to precise harm they have caused or business excuse for their use. *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir. 1978).

Footnote 4 **Reference Page A3**

15 U.S.C. § 15 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Footnote 5 **Reference Page A3**

15 U.S. § 26 provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles

as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Footnote 6 — Reference Page A3

28 U.S.C. § 1605(a)(2) provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

* * *

(2) in which the action is based upn a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

Footnote 7 — Reference Page A10

15 U.S.C. § 753(b)(2) provides in pertinent part:

(2) In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section —

(A) shall provide for a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level;

Footnote 8 — Reference Page A11

For full text of 28 U.S.C. 26, see footnote 5, *supra*.

Footnote 9 — Reference Page A14

28 U.S.C. § 1330(a) provides:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Footnote 10 **Reference Page A14**

A Federal Court in every case must first determine, on its own motion if the question is not otherwise suggested, whether the court has jurisdiction. *Warner v. Territory of Hawaii*, 206 F.2d 851, 852 (9th Cir. 1953). Accordingly, whenever the question of lack of jurisdiction arises, whether it be by the parties, by the court itself, or by the suggestion of *amici curiae* as in this case, it is the duty of the court to review this issue of jurisdiction.

Footnote 11 **Reference Page A15**

28 U.S.C. § 1604 provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1505 to 1607 of this chapter.

Footnote 12 **Reference Page A16**

The Court, dissatisfied with the apparent expertise and proposed testimony of the plaintiff's experts, Dr. Arnold E. Safer, Dr. James R. Kurth, and Dr. Stanley J. Foster, and after consulting the outstanding academic economic authorities in the United States, appointed as its own experts, Dr. M. A. Adelman, Professor of Economics at Massachusetts Institute of Technology, and Dr. Philip K. Verleger, Jr., Senior Research Scientist, School of Organization and Management, Yale University who until very recently had been working as Special Assistant to the Assistant Secretary for Economic Policy in the Department of the Treasury. Both of the experts were unanimously acknowledged by their peers as the two most outstanding and erudite experts in the field of both World and domestic petroleum economics.

That this action by the Court was a wise course is amply demonstrated by even a casual comparison between plaintiff's experts and the Court appointed experts, not only as to *expertise*, *compare* the curriculum vitae of Safer, Foster and Kurth (Exhibits 1, 7 and 10) *with* the curriculum vitae of Adelman and Verleger (Exhibits 25 and 37); but also as to testimony, *compare* testimony of Safer (Rep. Tr. 552-900), testimony of Foster (Rep. Tr. 903-1020) and testimony of Kurth (Rep. Tr. 1022-1122, 1162-1185) *with* testimony of Adelman (Rep. Tr. 1230-1522) and testimony of Verleger (Rep. Tr. 1523-1615).

This comparison confirms the wisdom of the Court's complete reliance upon its own appointed experts as contrasted with its skeptical consideration of plaintiff's experts.

Footnote 13 **Reference Page A19**

The United States voted in favor of Resolution 1803, which passed by a vote of 104-0-6. Resolution 1803, G.A. Res. 1803, § I(1), 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R 850 (1962).

Footnote 14 **Reference Page A21**

The legislative intent of FSIA does state that a " 'regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation." House Report No. 94-1487 at 16, 5 U.S.C. Cong. Ad. N. (1976) 6614-6615.

Plaintiff contends that because the OPEC member nations have a proprietary interest in the oil companies which are extracting the oil from within their respective territories, the price fixing activities in which the defendants engage are necessarily "commercial" in view of this legislative intent. While it may be true that through their activities as partial or total owners of these companies, the defendant nations do engage in commercial activities, this does not mean, and the legislative intent does not support the conclusion, that all activities, even those remotely connected with these companies, are necessarily commercial. The fact that a nation owns and operates an airline company, does not mean that all government activities regulating the use of airspace, or the ingress and egress of airplanes to and from the nation's airports, are commercial activities. Accordingly, we must look to the specific activities in which the defendants engage.

Here, a clear distinction must be drawn between the activities each government engages in by virtue of its proprietary interests and the activities in which it engages by virtue of its status as a sovereign. The activities of which plaintiff complains are clearly governmental. These activities are engaged in by the defendants in their status as sovereigns and not in their status as proprietors. This determination is conclusively established by looking to the nature of these activities and comparing them with governmental activities of other nations as we have already done.

This determination is further supported by the activities of the nations herein involved. Prior to *any* proprietary interest in any oil extracting company, each defendant nation set the terms of the withdrawal of its resources, through the mediums of taxation and royalties. Thus, the defendants were engaging in this governmental

conduct setting terms for crude production long before they obtained any ownership in any production companies. It necessarily follows that these activities are engaged in by virtue of each defendant's status as a sovereign — because these activities preceded *any* proprietary interest. Therefore, the essential nature of the activity is governmental.

Furthermore, this governmental nature does not change merely because the medium through which the activity is accomplished has changed. When defendants obtained ownership interests in their respective oil production companies, the media being utilized by the defendants to fix the terms of oil extraction were altered and were changed. Through their proprietary interests the nations could directly control the establishment of these terms. But this change in format does not change the essential nature of the activity, which is still governmental.

As a result, the conclusion is irrebuttable that these activities are governmental in nature.

Footnote 15 — Reference Page A22

28 U.S.C. § 1330(b) provides:

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

Footnote 16 — Reference Page A23

For full test of Section 1 of the Sherman Act see Footnote 1, *supra*.

Footnote 17 — Reference Page A24

Plaintiff has argued that *Parker v. Brown* has lost its effect through the decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). *Goldfarb* was an action challenging under § 1 of the Sherman Act a minimum fee schedule published by the Fairfax County Bar Association and enforced by Virginia State Bar. The State Bar and the County Bar attempted to use the *Parker v. Brown* doctrine as a defense because the State Bar was a State Agency and, as argued by the County Bar, the ethical codes and the activities of the State Bar prompted it to issue fee schedules. The Court, however, rejected these arguments, holding that anticompetitive activities must be compelled by direction of the State acting as a sovereign before the *Parker v. Brown* doctrine may be relied upon. 421 at 791. The Court,

finding that these activities were not compelled by the State, held that the *Parker v. Brown* doctrine did not apply to the activities of these State and County Bar defendants.

Here, the activities in which the OPEC defendants are engaged, are conducted by each sovereign nation itself. Thus we can only conclude that the nation by its direction has compelled these activities.

Our case here is clearly distinguishable from *Goldfarb* by the simple fact that we are not dealing with an agency of the state but the state itself. Accordingly, *Goldfarb* does not apply here except to the extent that it further supports the determination that when the state itself is conducting the activity, there is no violation of the antitrust laws.

LaFayette is equally inappropriate. The Court concluded in *LaFayette* that municipalities should not be excluded from the reach of the antitrust laws. The Court found that *Parker v. Brown's* exemption from the antitrust laws was limited to official action directed by the state. 435 at 412. The Court supported its ruling by stating that "States' subdivisions generally have not been treated as equivalents of the States themselves." *Id.* (Footnote omitted). Once again, we are not involved with any subdivisions of the OPEC nations, but the nations themselves. Accordingly *LaFayette* does not apply to our suit here.

Footnote 18 Reference Page A27

Giving a foreign sovereign the *option* to sue, merely allows the nation to use our judicial system if it wishes. Allowing foreign sovereigns to be sued, however, would *require* their presence in our courts. Thus the latter poses the greater threat to sensitive matters of foreign policy.

Footnote 19 Reference Page A27

This determination is consistent with the Court's rulings concerning domestic States under the antitrust laws. States may sue, *Georgia v. Evans*, 316 U.S. 159 (1942), but not be sued, *Parker v. Brown*, 317 U.S. 341 (1943), under the antitrust laws.

APPENDIX

ORDER TO SHOW CAUSE Re: Viability of Suit; Issues Therein; and Determination Thereof;

ORDER CONTINUING HEARING ON PRELIMINARY INJUNCTION;

ORDER SETTING CASE FOR TRIAL ON FINAL INJUNCTION, AND EVIDENTIARY HEARING RE DEFAULTS

AND

CONSOLIDATING TRIAL AND EVIDENTIARY HEARING WITH HEARING ON PRELIMINARY INJUNCTION

I. Order to Show Cause, Re: Viability of Suit; Issues of Suit; Issues Therein; and Determination Thereof; II. Order Continuing Hearing on Preliminary Injunction; III. Order Setting Case for Trial on Final Injunction, and Evidentiary Hearing re Defaults and Consolidating Trial and Evidentiary Hearing with Hearing on Preliminary Injunction; IV. Order for Service.

United States District Court, Central District of California.

International Association of Machinists and Aerospace Workers, ("IAM"), An Association, Plaintiff, v. The Organization of the Petroleum Exporting Countries ("OPEC"); The Democratic and Popular Republic of Algeria, ("Algeria"); The Republic of Ecuador, ("Ecuador"); The Gabonese Republic, ("Gabon"); Republic of Indonesia, ("Indonesia"); Imperial Government of Iran, ("Iran"); Republic of Iraq, ("Iraq"); State of Kuwait, ("Kuwait"); Libyan Arab Republic ("Libya"); Federal Republic of Nigeria, ("Nigeria"); State of Qatar, ("Qatar"); Kingdom of Saudi Arabia, ("Saudi Arabia"); State of United Arab Emirates, ("United Arab Emirates"); and the Republic of Venezuela, ("Venezuela"), Defendants.

No. 78-5012-AAH (SX).

TO: PLAINTIFF herein, and its attorneys and counsel of record.

TO: DEFENDANTS herein, and each of their respective attorneys and counsel, whether of record or not.

TO: UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, and ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES DEPARTMENT OF STATE and SECRETARY OF STATE OF THE UNITED STATES;

UNITED STATES DEPARTMENT OF ENERGY and SECRETARY OF ENERGY OF THE UNITED STATES; and their attorneys and counsel, ATTORNEY GENERAL OF THE UNITED STATES and UNITED STATES ATTORNEY, CENTRAL DISTRICT OF CALIFORNIA.

TO: STATES OF THE UNITED STATES and SECRETARY OF STATE and ATTORNEY GENERAL of each State, and their respective attorneys and counsel.

TO: All persons and entities to whom these presents shall come, concern or appertain, and their respective attorneys and counsel.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that because of the complexities of the within lawsuit, the difficulties in framing the issues therein contained, and the far-reaching effects of judicial determination thereof, the Court has this day and date made and entered the following Orders:

I.

ORDER TO SHOW CAUSE

On MONDAY, August 20, 1979, at 10:00 o'clock A.M. Pacific Daylight Saving Time, or as soon thereafter as attorneys and counsel can be heard, in Courtroom 1, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012 the above entitled United States District Court, Central District of California, the Honorable A. Andrew Hauk, Judge Presiding, will hear: from any and all of the aforesaid parties, persons, entities, organizations, sovereigns, sovereignties; from all departments, agencies and instrumentalities thereof; and from any and all attorneys and counsel thereof: any and all cause, causes, reasons, rationales and theories which they or any of them have and

desire to present, express or suggest to the Court with respect to, in support of or in opposition to, in question of or in answer to any or all of the following inquiries:

GENERAL

1. Is the within lawsuit a viable, valid, legal, proper and justiciable controversy validly and legally brought in and pending before this Court?

2. Does the within lawsuit raise any issue or issues that are or can be validly and legally determinable in and by this Court?

3. Are any or all of the issue or issues which the within lawsuit raises validly and legally determinable only by the Legislative and/or Executive branches of the United States Government rather than by the Judicial branch thereof?

4. Are the acts and activities of defendants, as alleged by plaintiff in the within lawsuit "Acts of State" *not* within the reach, purview or coverage of the laws of the United States, and therefore not within the jurisdiction of the United States Courts, and more particularly this Court?

SUBJECT MATTER JURISDICTION

5. Does the within lawsuit sufficiently state or set forth any valid and legal claims for relief, or raise any issues under and by virtue of the Foreign Sovereign Immunities Act of 1976, 28 United States Code 1602-1611, Public Law 94-583, 90 Stat. 2892 (Oct. 21, 1976), so as to invest subject matter jurisdiction in this Court?

6. Does the within lawsuit sufficiently state or set forth any valid and legal claims for relief, or raise any issues under and by virtue of the Sherman Antitrust Act, Section 1, 15 United States Code 1, and the Clayton Act, Sections 4 and 16, 15 United States Code 15 and 26, so as to invest subject matter jurisdiction in this Court?

7. Do any of the acts and activities of the defendants, as alleged by plaintiff in the within lawsuit, constitute "commercial activity [carried on] in the United States [by the foreign state]," 28 U.S.C. 1605(a) (2) and 1603(d); or "commercial activity carried on [elsewhere] and having substantial contact with the United States," 28 U.S.C. 1605(a) (2) and 1603(e); or "an act performed in the United States in connection with a commercial activity [of the foreign state] elsewhere," 28 U.S.C. 1605(a) (2); or "an act outside the territory of the United States in connection with a commercial activity [of the foreign state] elsewhere and that act causes a direct effect in the United States," 28 U.S.C. 1605(a) (2)?

8. Is the within lawsuit "a case not otherwise encompassed in paragraph (2) above [28 U.S.C. 1605(a) (2)], in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment," except "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused" and except "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," 28 U.S.C. 1605(a) (5)? *Note:* Legislative History seems to indicate this kind of a case was intended to cover "a traffic accident or other noncommercial tort," 1976 U.S. Code Cong. & Adm. News, Vol. 5, p. 6604 at p. 6620, 94th Cong. 2d Sess., and would appear irrelevant in the context of the within lawsuit.

IN PERSONAM JURISDICTION

9. Have any or all of the defendants been validly and legally served with process, i.e., Summons and Complaint and First Amended Complaint, under and by virtue of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1608? If so, which defendant or defendants, and in what manner? Does any such service invest in personam jurisdiction in this Court over the defendant or defendants so served?

PLAINTIFF'S RIGHT TO SUE; STANDING

10. *Damages — Clayton Act, Section 4, 15 U.S.C. 15 15*

Is not plaintiff precluded from bringing the within lawsuit against defendants, in that plaintiff is an indirect purchaser of gasoline sold to plaintiff by and through third parties other than defendants, which gasoline was manufactured and refined by said third parties from oil produced and sold by defendants directly to said third parties; and further in that plaintiff utilizes and relies upon so-called "pass on" and "pass through" theories to support its claim for damages allegedly suffered by paying higher and higher prices from time to time for said gasoline, which gasoline prices plaintiff claims were raised and caused to be raised by reason of the higher and higher oil prices fixed and raised by defendants, which oil price raises were "passed on" or "passed through" to plaintiff by the third party intermediate buyers of oil produced by defendants, which third party intermediate buyers manufactured and refined into the gasoline ultimately purchased by plaintiff? *Note:* See *Illinois Brick Co. v. Illinois*, 431 U.S. 721 (1977), particularly at 728-729, at 735-736, and at 744-748, wherein the United States Supreme Court in a 6-3 decision, while not addressing the standing issue, applies the *Hanover Shoe* [Hanover Shoe

Inc., v. United Shoe Machinery Corp., 392 U.S. 481 (1968)] doctrine against defensive use of "pass on" theories by antitrust defendants to *offensive* use of such "pass on" theories by antitrust plaintiffs who are indirect purchasers from intermediate third parties other than defendants.

11. *Injunctive Relief — Clayton Act, Section 16, 15 U.S.C. 26*

Although by the ruling of *Illinois Brick, supra,* the Supreme Court effectively bars, or may effectively bar, plaintiff's claim for damages against defendants, does it bar injunctive relief in favor of plaintiff and against defendants? *Note: See Mid-West Paper Products Co. v. Continental Group, Inc.,* .... F.2d ...., (3d Cir. 1979), CCH Trade Reg. Rep. ¶ 62,531, pp. 77,070-77,091, particularly at pp. 77,083-77,087, wherein the Court of Appeals for the Third Circuit in a 2-1 decision, holds that indirect purchasers have standing to sue for and obtain injunctive relief under Clayton Act, Section 16, 15 U.S.C. 26, even though barred from damage actions under Clayton Act, Section 4, 15 U.S.C. 15, by the Supreme Court in the *Illinois Brick* case, *supra.*

DEFAULT ENTRY AND DEFAULT JUDGMENT

12. Is plaintiff, by reason of effective, valid and legal service of process, entitled to *Default Entry by Clerk* when a defendant fails or refuses to file and serve "an answer or other responsive pleading to the complaint within sixty days after service upon such defendant," 28 U.S.C. 1608(d)? If so, as against which defendant or defendants, and why? What is the effect of any such *Default Entry by Clerk?*

13. What must the Court do by way of evidentiary hearing before making or entering an effective valid and legal *Default Judgment,* in order to comply with the mandatory

language of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Section 1608(e) which provides:

> "(e) No judgment by default shall be entered by a court of the United States . . . against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

14. In this connection, "since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity." Legislative History, 1976 U.S.C.C. & A. News, Vol. 5, p. 6616. In other words, the foreign state must produce prima facie evidence of immunity. What, therefore, is the effect of the foreign state's failure to answer or file a responsive pleading? What is the result of a default judgment against the foreign state? Does this mean that the foreign state by failing to assert the affirmative defense and by defaulting, has explicitly or by implication waived immunity and left itself open by way of default judgment against it for injunctive relief?

ATTACHMENT OR EXECUTION
(Attachment in Aid of Execution)

15. ***Before Judgment Against A Defendant's Property Used For A Commercial Activity In The United States.***

Does the Court have any jurisdiction or power to issue a writ of attachment (garnishment, sequestration, arrest or seizure) *pendente lite* against property in the United States belonging to a defendant, *prior* to entry of Judgment? If so, is not that jurisdiction and power limited to situations where:

(a) the defendant has "*explicitly* waived" immunity against pre-judgment attachment; and

(b) "the purpose of the attachment is to secure satisfaction of a judgment that has been or ultimately may be entered against the foreign state, and not to obtain jurisdiction." 28 U.S.C. 1610(d) (1) and (2). [Emphasis ours].

16. *After Judgment Against A Defendant's Property Used For A Commercial Activity In The United States.*

Does the Court have any jurisdiction or power to issue a writ of execution (or a writ of attachment in aid of execution) against property in the United States belonging to a defendant *after* entry of Judgment? If so, is not that jurisdiction and power limited to situations where:

(a) "the foreign state has waived its immunity . . ." either *explicitly* or by *implication*;

or

(b) "the property is or was used for the commercial activity upon which the claim is based," *or* 28 U.S.C. 1610(a) (1) and (2) (Emphasis ours, and other permissive executions *after judgment* in the Act are not relevant.) *or*

(c) The execution or attachment in aid of execution is against property of an "agency or instrumentality of a foreign state," which agency or instrumentality has waived its immunity . . . either *explicitly* or by *implication*," or "the judgment relates to a claim" under 28 U.S.C. 1605(a) (2) or (5), "regardless of whether the property is or was used for the activity upon which the claim is based." 28 U.S.C. 1610(b) (1) and (2) (Emphasis ours).

17. In connection with inquiries 14 and 15 above, what is the proper, valid and legal meaning of the word "ex-

plicitly" when applied to waiver of immunity? And what is the meaning of the words "explicitly or by implication" when applied to waiver of immunity in 28 U.S.C. 1610?

PROPRIETY OF PRELIMINARY INJUNCTION

18. Has plaintiff met the conditions necessarily prerequisite to obtaining a preliminary injunction? Has it demonstrated or can it demonstrate to the satisfaction of the Court that:

1. It is probable and there is a clear likelihood that plaintiff will, after trial on the merits, prevail and be awarded judgment against defendants, either for damages or for final injunctive relief?
2. Would the injury, damage and hardship to defendants that would be caused by the Court in granting the preliminary injunction be outweighed by the injury, damage and hardship to plaintiff that would be caused by the Court in not granting the preliminary injunction?
3. Is any injury or damage suffered or allegedly anticipated to be suffered by plaintiff irreparable and certain to occur?
4. Is it in the public interest to grant the preliminary injunction to plaintiff?

II.

ORDER CONTINUING HEARING ON PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED THAT the hearing of plaintiff's Motion For a Preliminary Injunction be and the same is hereby continued for further hearing to the date of MONDAY, August 20, 1979, in Courtroom 1, United States Courthouse, Los Angeles, California 90012, the Honorable A. Andrew Hauk, Judge Presiding.

III.

ORDER SETTING CASE FOR TRIAL ON FINAL INJUNCTION AND EVIDENTIARY HEARING RE DEFAULTS

AND

CONSOLIDATING TRIAL AND EVIDENTIARY HEARING WITH HEARING ON PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED that, pursuant to Rule 65(a) (2), F.R. Civ. P., the trial on the merits of the Final Injunction sought in the within lawsuit, and pursuant to 28 U.S.C. 1608(e) the evidentiary hearing re defaults, be and the same hereby are consolidated with the further hearing on plaintiff's Motion for a Preliminary Injunction, and the said trial on the merits of the Final Injunction, the said evidentiary hearing re defaults, and the further hearing on Preliminary Injunction be and the same are hereby set for MONDAY, AUGUST 20, 1979, in Courtroom 1, United States Courthouse, Los Angeles, California 90012, the Honorable A. Andrew Hauk, Judge Presiding.

IV.

ORDER FOR SERVICE

IT IS FURTHER ORDERED that attorneys and counsel for plaintiff shall serve a copy of this Order to Show Cause upon the plaintiff and all persons who have appeared in the within lawsuit by serving it or its, or them or their, respective attorneys and counsel of record, by registered mail, return receipt requested; upon all defendants who have not appeared herein, and their attorneys and counsel by serving said defendants by registered mail, return receipt request, and by following the procedure of service through the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services, as

provided in the Foreign Sovereign Immunities Act, 28 U.S.C. 1608(a) (4); upon the United States of America, and its Department of Justice and Attorney General, its Department of State and Secretary of State, its Department of Treasury and Secretary of Treasury, its Department of Energy and Secretary of Energy by registered mail, return receipt requested, addressed to the Attorney General of the United States, United States Department of Justice, Washington, D.C. and to the United States Attorney, Central District of California, United States Courthouse, Los Angeles 90012; upon each and all States of the United States and each respective Governor, Secretary of State and Attorney General, by registered mail, return receipt requested, addressed to the Honorable Attorney General of each State of the United States, at the State Capitol Building of each such State; and upon all other persons to whom this Order shall come, concern, or appertain, by making copies hereof available to all news media and to any such persons requesting a copy. Such copy and service thereof shall be effected and effective if made and done, including service of the copy of the First Amended Complaint and Summons upon those not as yet served therewith, all in the English language. And all pleadings, motions, answers, points and authorities, and papers served shall be filed in the within Court and with its Clerk of Court on or before Wednesday, August 1, 1979, and served upon attorneys and counsel for plaintiff, Law Offices of Richard I. Fine, 10100 Santa Monica Boulevard, Los Angeles, California 90067 on or before the same date.

Dated: Monday, June 25, 1979

A. ANDREW HAUK
United States District Judge
Central District of California

APPENDIX B.

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Nov. 5, 1980.
Decided July 6, 1981.

International Association of Machinists and Aerospace Workers, (IAM), an association, Plaintiff-Appellant, v. The Organization of the Petroleum Exporting Countries (OPEC); The Democratic and Popular Republic of Algeria (Algeria); The Republic of Ecuador (Ecuador); The Gabonese Republic (Gabon); Republic of Indonesia (Indonesia); Imperial Government of Iran (Iran); Republic of Iraq (Iraq); State of Kuwait (Kuwait); Libyan Arab Republic (Libya); Federal Republic of Nigeria (Nigeria); State of Qatar (Qatar); Kingdom of Saudi Arabia (Saudi Arabia); State of United Arab Emirates, (United Arab Emirates); and The Republic of Venezuela (Venezuela), Defendants-Appellees.

No. 79-3673.

Appeal from the United States District Court for the Central District of California.

Before CHOY and NELSON, Circuit Judges, and SPEARS,* District Judge.

CHOY, Circuit Judge:

I.
INTRODUCTION

The members of the International Association of Machinists and Aerospace Workers (IAM) were disturbed by the high price of oil and petroleum-derived products in the United States. They believed the actions of the Organiza-

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*The Honorable Adrian A. Spears, Senior United States District Judge for the Western District of Texas, sitting by designation.

tion of the Petroleum Exporting Countries, popularly known as OPEC, were the cause of this burden on the American public. Accordingly, IAM sued OPEC and its member nations in December of 1978, alleging that their price-setting activities violated United States anti-trust laws. IAM sought injunctive relief and damages. The district court entered a final judgment in favor of the defendants, holding that it lacked jurisdiction and that IAM had no valid anti-trust claim.[1] We affirm the judgment of the district court on the alternate ground that, under the act of state doctrine, exercise of federal court jurisdiction in this case would be improper.

II.
FACTUAL BACKGROUND

IAM is a non-profit labor association. Its members work in petroleum-using industries, and like most Americans, they are consumers of gasoline and other petroleum-derived products. They object to the high and rising cost of such products.

OPEC is an organization of the petroleum-producing and exporting nations of what is sometimes referred to as the Third World. The OPEC nations have organized to obtain the greatest possible economic returns for a special resource which they hope will remove them from the ranks of the underdeveloped and the poverty-plagued. OPEC was formed in 1960 by the defendants Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. The other defendants, Algeria, Ecuador, Gabon, Indonesia, Libya, Nigeria, Qatar, and the United Arab Emirates, joined thereafter.

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[1]The district court opinion is reported at 477 F.Supp. 553 (C.D. Cal. 1979).

The OPEC nations produce and export oil either through government-owned companies or through government participation in private companies. Prior to the formation of OPEC, these diverse and sometimes antagonistic countries were plagued with fluctuating oil prices. Without coordination among them, oil was often in oversupply on the world market resulting in low prices. The OPEC nations realized that self-interest dictated that they "formulate a system to ensure the stabilisation (sic) of prices by, among other means, the regulation of production, with due regard to the interests of the producing and of the consuming nations, and to the necessity of securing a steady income to the producing countries, an efficient economic and regular supply of this source of energy to consuming nations. . . ." OPEC Resolution 1.1(3), September 1960.

OPEC achieves its goals by a system of production limits and royalties which its members unanimously adopt. There is no enforcement arm of OPEC. The force behind OPEC decrees is the collective self-interest of the 13 nations.

After formation of OPEC, it is alleged, the price of crude oil increased tenfold and more. Whether or not a casual relation exists, there is no doubt that the price of oil has risen dramatically in recent years, and that this has become of international concern.

Supporters[2] of OPEC argue that its actions result in fair world prices for oil, and allow OPEC members to achieve a measure of economic and political independence. Without OPEC, they say, in the rush to the marketplace these nations

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[2]See, e.g., Amuzegar, OPEC in the Context of the Globel Power Equation, 4 Denver, J. Int'l L. & Pol'y 221 (1974); Shihata, Arab Oil Policies and the New International Economic Order, 16 Virginia J. Int'l 261 (1976).

would rapidly deplete their only valuable resource for ridiculously low prices.

Detractors accuse OPEC of price-fixing and worse in its deliberate manipulation of the world market and withholding of a resource which many world citizens have not learned to do without.[3]

In December 1978, IAM brought suit against OPEC and its member nations. IAM's complaint alleged price fixing in violation of the Sherman Act, 15 U.S.C. §1, and requested treble damages and injunctive relief under the Clayton Act, 15 U.S.C. §§15, 16. IAM claimed a deliberate targeting and victimization of the United States market, directly resulting in higher prices for Americans.

The defendants refused to recognize the jurisdiction of the district court, and they did not appear in the proceedings below. Their cause was argued by various amici, with additional information provided by court-appointed experts. The district court ordered a full hearing, noting that the Foreign Sovereign Immunities Act (FSIA) prohibits the entry of a default judgment against a foreign sovereignty "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e).

The district court initially dismissed OPEC, the organization, since it had not been properly served. It also determined at an early stage in the proceedings that monetary damages were foreclosed by the indirect-purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). Thus the testimony at trial was directed to what remained of the complaint — a suit for injunctive relief against the 13 OPEC nations individually.

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[3]IAM refers to the demand for oil as "inelastic" — a demand which exits regardless of price. While this conclusion is subject to dispute, the record reflects a persistent world demand for this commodity.

The testimony was extensive. Experts in economics and international relations were examined and cross-examined. Exhibits, including masses of statistical and technical data, were received. A full day of legal argument concluded the proceedings below.

The record reflects an outstanding effort on the part of the district judge to amass the information necessary to understand the international politics and economy of oil and to marshal the legal arguments for and against IAM's requested relief.

At the close of the trial, the district judge granted judgment in favor of the defendants. The court held, first, that it lacked jurisdiction over the defendant nations under the Foreign Sovereign Immunities Act.[4] The court further held

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[4]The Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, codified at 28 U.S.C. § 1330, actions against foreign states, which states:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement;

and 28 U.S.C. §§1602, et seq., which states in relevant part:

> §1602. Findings and declaration of purpose
>
> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.
>
> § 1605. General exceptions to the jurisdictional immunity of a foreign state
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> * * * * * *

(footnote continued on following page)

that even if jurisdiction existed in the first instance, the antitrust action failed because foreign sovereigns are not persons within the meaning of the Sherman Act and because there was no proximate causal connection between OPEC activities and domestic price increases. The court also decided that default judgment could not properly lie against the nonappearing defendants, and that the defendants had not waived their immunity.

III.
DISCUSSION

A. Sovereign Immunity

In the international sphere each state[5] is viewed as an independent sovereign, equal in sovereignty to all other states. It is said that an equal holds no power of sovereignty over an equal. Thus the doctrine of sovereign immunity: the courts of one state generally have no jurisdiction to entertain suits against another state. This rule of international law developed by custom among nations. Also by custom, an exception developed for the commercial activities of a state. The former concept of absolute sovereign immunity gave way to a restrictive view. Under the restrictive theory of sovereign immunity, immunity did not exist for commercial activities since they were seen as non-sovereign.

In 1976, Congress enacted the FSIA and declared that the federal courts will apply an objective nature-of-the-act

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(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

[5]In accordance with international usage, the term "states" refers to nations as opposed to the domestic states of the United States.

test[6] in determining whether activity is commercial and thus not immune: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

A critical step in characterizing the nature of a given activity is defining exactly what that activity is. The immunity question may be determined how broadly or narrowly that activity is defined. In this case, IAM insists on a very narrow focus on the specific activity of "price fixing." IAM argues that the FSIA does not give immunity to this activity. Under the FSIA a commercial activity is one which an individual might "customarily carr[y] on for profit." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 16, reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6615. OPEC's activity, characterized by IAM as making agreements to fix prices, is one which is presumably done for profit; it is thus commercial and immunity does not apply.

The court below defined OPEC's activity in a different way: "[I]t is clear that the nature of the activity engaged

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[6]The categorization of activity as commercial or non-commercial is a source of controversy. Two different tests arose to determine the character of the state activity. One focused on the purpose of the activity, the other on the nature of the activity. The purpose test, which asks whether the act in question was undertaken for sovereign ends, is subjective. The nature test, which focuses on the nature of the act itself, is objective. The purpose test grants broader immunity, since even the most commercial activity could have an underlying governmental purpose. For example, the purchase of furniture is objectively a commercial act. if the furniture is purchased for a state's embassy, however, under the purpose test, the act is sovereign and immunity applies. The problem with the purpose test is that the expectations of the furniture seller relying on the commercial appearance of the activity would be frustrated if the foreign government could claim immunity and disclaim its obligation to pay. Only the objective test would protect the seller's reliance on the nature and appearance of the purchase as commercial activity subject to domestic laws.

in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource — to wit, crude oil — from its territory." 477 F.Supp. at 567. The trial judge reasoned that, according to international law, the development and control of natural resources is a prime governmental function. Id. at 567-78. The opinion cites several resolutions of the United Nations' General Assembly, which the United States supported, and the United States Constitution, Art. 4, § 3, cl. 2, which treat the control of natural resources as governmental acts.

IAM argues that the district court's analysis strays from the path set forth in the FSIA. The control of natural resources is the purpose behind OPEC's actions, but the act complained of here is a conspiracy to fix prices. The FSIA instructs us to look upon the act itself rather than underlying sovereign motivations.

The district court was understandably troubled by the broader implications of an anti-trust action against the OPEC nations. The importance of the alleged price-fixing activity to the OPEC nations cannot be ignored. Oil revenues represent their only significant source of income. Consideration of their sovereignty cannot be separated from their near total dependence upon oil. We find that these concerns are appropriately addressed by application of the act of state doctrine. While we do not apply the doctrine of sovereign immunity, its elements remain relevant to our discussion of the act of state doctrine.

B. The Act of State Doctrine

[1] The act of state doctrine declares that a United States Court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state. This doctrine was expressed

by the Supreme Court in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

The act of state doctrine is similar to the political question doctrine in domestic law. It requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question. Like the political question doctrine, its applicability is not subject to clear definition. The courts balance

various factors to determine whether the doctrine should apply.

While the act of state doctrine has no explicit source in our Constitution or statutes, it does have "constitutional underpinnings." *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 937, 11 L.Ed.2d 804 (1964). The Supreme Court has stated that the act of state doctrine

> arises out of the basic relationships between branches of government in a system of separation of powers. . . . The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. Id.

The principle of separation of powers is central to our form of democratic government. Just as the courts have carefully guarded their primary role as interpreters of the Constitution and the laws of the United States, so have they recognized the primary role of the President and Congress in resolution of political conflict and the adoption of foreign policy. Compare *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

[2,3] The doctrine of sovereign immunity is similar to the act of state doctrine in that it also represents the need to respect the sovereignty of foreign states. The two doctrines differ, however, in significant respects. The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional. *Ricaud v. American Metal Co.*, 246 U.S. 304, 309, 38 S.Ct. 312,

313, 62 L.Ed. 733 (1918). Rather, it is a prudential doctrine designed to avoid judicial action in sensitive areas. Sovereign immunity is a principle of international law, recognized in the United States by statute. It is the states themselves, as defendants, who may claim sovereign immunity. The act of state doctrine is a domestic legal principle, arising from the peculiar role of American courts. It recognizes not only the sovereignty of foreign states, but also the spheres of power of the co-equal branches of our government. Thus a private litigant may raise the act of state doctrine, even when no sovereign state is a party to the action. See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976). The act of state doctrine is apposite whenever the federal courts must question the legality of the sovereign acts of foreign states.

[4] It has been suggested that the FSIA supersedes the act of state doctrine, or that the amorphous doctrine is limited by modern jurisprudence.[7] We disagree.

Congress in enacting the FSIA recognized the distinction between sovereign immunity and the act of state doctrine. See, e.g., H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 20 n.1, reprinted in [1976] U.S. Code Cong. & Ad. News 6619 n.1 ("The Committee has found it unnecessary to address the act of state doctrine in this legislation"); see generally Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 29-57 (1976);

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[7]See n.8, infra; *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 111 (1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972) (noting and rejecting the contention that the act of state doctrine "has been sapped of its vitality and rationale" by the "Sabbatino Amendment," 22 U.S.C. § 2370(e)(2)).

Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims & Governmental Relations of the Committee on the Judiciary, 93d Cong., 1st Sess. 20 (1973) (the FSIA "in no way affects existing law concerning the extent to which the 'act of state' doctrine may be applicable in similar circumstances"). Indeed, because the act of state doctrine addresses concerns central to our system of government, the doctrine must necessarily remain a part of our jurisprudence unless and until such time as a radical change in the role of the courts occurs.

The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. While purely commercial[8] activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. As the district court noted, OPEC's "price-fixing" activity has a significant sovereign component. While the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not. This court has stated that the motivations of the sovereign must be examined for a public interest basis. *Timberlane*, 549 F.2d at 607. When the state qua state acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. Because the act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, we find that the act of state doctrine remains available when such caution is appropriate,

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[8]In *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 698, 96 S.Ct. 1854, 1863, 48 L.Ed.2d 301 (1976), the court held that purely commercial activity does not require judicial deference under the act of state doctrine. The *Dunhill* case suggested but did not decide the question of whether the act of state doctrine is subsumed by the doctrine of sovereign immunity. Compare opinion of Justice White, 425 U.S. 682, 705 at n.18, 96 S.Ct. 1854, 1866 at n.18, 48 L.Ed.2d 301, with Justice Marshall's dissent, at 725-728, 96 S.Ct. at 1875.

regardless of any commercial component of the activity involved.

In addition to the public interest factor, a federal court must heed other indications which call for act of state deference. The doctrine does not suggest a rigid rule of application. In the *Sabbatino* case, the Supreme Court suggested a balancing approach:

> some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.
> 376 U.S. at 428, 84 S.Ct. at 940.

The decision to deny access to judicial relief is not one we make lightly. In *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976), this court noted that "not every case is identical in its potential impact on our relations with other nations." The "touchstone" or "crucial element" is the potential for interference with our foreign relations. *Timberlane*, 549 F.2d at 607. This court has stated:

> we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of *Sabbatino*, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." Id. (Citations omitted.)

There is no question that the availability of oil has become a significant factor in international relations. The growing world energy crisis has been judicially recognized in other cases. See, e.g., *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978), cert. denied, 442 U.S. 928, 99 S.Ct. 2857, 61

L.Ed.2d 296 (1979) (dismissing an action to determine rights to oil in the Persian Gulf as raising a nonjusticiable political question); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 78 (2d Cir.) cert. denied, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977) (affirming, on the basis of the act of state doctrine, dismissal of anti-trust claim where the act complained of was part of "a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants"). The record in this case contains extensive documentation of the involvement of our executive and legislative branches with the oil question. IAM does not dispute that the United States has a grave interest in the petro-politics of the Middle East, or that the foreign policy arms of the executive and legislative branches are intimately involved in this sensitive area. It is clear that OPEC and its activities are carefully considered in the formulations of American foreign policy.

The remedy IAM seeks is an injunction against the OPEC nations. The possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them is apparent from the very nature of this action and the remedy sought. While the case is formulated as an anti-trust action, the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources. On the other hand, should the court hold that OPEC's actions are legal, this "would greatly strengthen the bargaining hand" of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions. *Sabbatino*, 376 U.S. at 432, 84 S.Ct. at 942.

A further consideration is the availability of internationally-accepted legal principles which would render the issues

appropriate for judicial disposition. As the Supreme Court stated in Sabbatino,

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. 376 U.S. at 428, 84 S.Ct. at 940.

While conspiracies in restraint of trade are clearly illegal under domestic law, the record reveals no international consensus condemning cartels, royalties, and production agreements.[9] The United States and other nations have supported the principle of supreme state sovereignty over natural resources. The OPEC nations themselves obviously will not agree that their actions are illegal. We are reluctant to allow judicial interference in an area so void of international consensus. An injunction against OPEC's alleged price-fixing activity would require condemnation of a cartel system which the community of nations has thus far been unwilling to denounce. The admonition in Sabbatino that the courts should consider the degree of codification and consensus in the area of law is another indication that judicial action is inappropriate here.

[5] The district court was understandably reluctant to proceed on the complaint below and the act of state doctrine provides sound jurisprudential support for such reluctance.

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[9]The amici suggest that production quotas and royalties are accepted sovereign practices, citing, inter alia, the Connally Hot Oil Act, 15 U.S.C. § 715; United States' payment to farmers not to produce wheat; and Japan's voluntary reduction of TV and automobile production to maintain prices.

While the act of state doctrine does not compel dismissal as a matter of course, in a case such as this where the controlling issue is the legality of a sovereign act and where the only remedy sought is barred by act of state considerations dismissal is appropriate.

IV.
CONCLUSION

The act of state doctrine is applicable in this case. The court should not enter at the will of litigants into a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint. The issue of whether the FSIA allows jurisdiction in this case need not be decided, since a judicial remedy is inappropriate regardless of whether jurisdiction exists. Similarly, we need not reach the issues regarding the indirect-purchaser rule, the extra-territorial application of the Sherman Act, the definition of "person" under the Sherman Act, and the propriety of injunctive relief.

The decision is the district court dismissing this action is AFFIRMED.

APPENDIX C.

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 7. "Person" defined

The word "person," or "persons," wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 8. Trusts in restraint of import trade illegal; penalty

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

15 U.S.C. § 12. Words defined; short title

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections

seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purpose,' " approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, that nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act."

15 U.S.C. § 15. Suits by persons injured; amount of recovery; prejudgment interest

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of

such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

(1) Whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking it merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) Whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) Whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

15 U.S.C. § 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improv-

idently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue; Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fees, to such plaintiff.

15 U.S.C. § 72. Importation or sale of articles at less than market value or wholesale price

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of the trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.

15 U.S.C. § 753(b)(2)(A). Petroleum Allocation

(2) In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section —

> (A) Shall provide for a dollar-for-dollar pass-through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level; . . . .

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are con-

cerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter —

(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity —

(1) Which is a separate legal person, corporate or otherwise, and

(2) Which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) Which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(2). General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

* * * * * *

(2) In which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity

either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

APPENDIX D.

Reporters' Transcript of Proceedings, Wednesday, August 22, 1979, Los Angeles, California.

In the United States District Court, Central District of California.

Honorable A. Andrew Hauk, Judge Presiding.

International Association of Machinists and Aerospace Workers, ("IAM"), an Association, Plaintiff, vs. The Organization of the Petroleum Exporting Countries ("OPEC"), *et al*, Defendants.

NO. 78-5012-AAH.

Adelman — Examination page 1500.

Q. Also, have you ever made a study on the subject of governments getting together with each other to determine the prices at which either they or their government-owned corporations were to sell oil as being commercial governmental acts or sovereign governmental acts?

A. The article you quoted was such a study.

Q. And in that article what was your conclusion with respect to the governments getting together to set the prices at which either the governments and/or their national-owned oil companies were to sell oil?

A. *My conclusion was that the governments got together and fixed the price of oil.* (Emphasis supplied).

Q. Okay. Did you ever draw a conclusion as to whether that getting together by the governments to fix the price of oil was a commercial governmental act or a sovereign governmental act?

A. I drew no legal conclusions.

APPENDIX E.

Reporter's Transcript of Proceedings.

Before the United States Court of Appeals for the Ninth Circuit; Judge Herbert Y. C. Choy, Judge Dorothy W. Nelson, Judge Adrian A. Spears.

In re: International Association of Machinists, etc., Plaintiff-Appellant, vs. The Organization of the Petroleum Exporting Countries, Defendant-Appellee.

No. 79 3673. Pages 12-15.

Now, may I quickly, with the rest of my time, mention one other matter of a commercial nature. I think the Court probably has copies of the OPEC bulletin of March 3, 1980. One of the questions that came up in the trial was the question of whether or not any OPEC nation was actually doing business here, and since Pertamina is represented here today in the sense of the Indonesia committee, I will not deal with tankers, three new tankers, and I will not deal with the New York office of the National Iranian Oil Company up to the time of the embargo. I will just deal with telephone numbers that we can go to right here in this courthouse and dial.

If you look at page 23, "Foreign Representative Offices," dealing with an oil company under the aegis of the Bureau of Mines in Indonesia that distributes 348 million barrels a year, most of it going to Japan, the other part going to the United States, and if you go to telephone number 277-3721, they answer it "Pertamina," and if you read further in the document you will find that that handles Pertamina's sales as a foreign representative offfice for all of North America.

Now, at the trial we subpoenaed the Southern California Edison Company documents on their sales and purchases from Pertamina. We were not allowed to see the documents fully, but we did see a portion of them and we did find the

signature of this man who is listed on page 27, Mr. Garsona, who signed on behalf of Pertamina, buying substantial quantities of oil for the Southern California Edison Company, and he told us at that time in the trial, in the transcript, that it made very little difference what they bought from Pertamina, and as the documents we presented to the Court on motion for new trial showed, Southern California Edison Company in affidavits presented to the Public Utilities Commission here and in press releases said — I would like to get the exact language, if I can — "Edison has asked the California Public Utilities Commission for $463 million of rate relief because of the unprecedented rate of increase in oil prices set by the Organization of Petroleum Exporting Countries, amounting to roughly a 50-percent increase in bills of Southern California Edison in our community."

My time is running out, but I would just say this, if the Court please: The issue is whether or not it is commercial. That is what you are going to find when you finally come down to it. And when they have contended that they are cloaked in immunity because their acts are governmental and not commercial, to me they are ignoring the obvious and they are ignoring the price fix.

In conclusion, if I may be permitted just say this, I am reminded of the moral of the Hans Christian Andersen fairy tale that pointed out that when the Emperor rides down the street naked, someone somewhere should say, "The Emperor has no clothes."

I appreciate the attention of the Court.

JUDGE NELSON: I would like to ask a question on the Sabbatino case, and this is on the Act of State Doctrine, the balancing test.

In Sabbatino it says, "Some aspects of international law cut more sharply on the national nerves than do others."

As I read the Act of State Doctrine, it says the Act of State Doctrine considers whether the decisions on the merits will necessarily require an examination of the policies of a foreign sovereign.

And I cannot — As I read the briefs, it seems the matter of oil and oil production certainly touches upon the policies of not one, but several foreign sovereigns. You are indicating, when you turn to the Court, that because the activity is involved with commercial activity that we should ignore the fact that it touches on the national nerves of several foreign states.

MR. DAVIS: That's a very good question, your Honor. Just preliminarily, may I just mention that I have been trying cases 25 years and I have never seen anybody sued yet who didn't have their nerves affected, but that is not a foreign nation. [. . .]

Amicus Brief

MOTION FILED
NOV 2- 1982

No. 81-645

IN THE

Supreme Court of the United States

October Term, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AN ASSOCIATION,

Petitioner,

—against—

THE ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES ("OPEC"); THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA ("ALGERIA"); THE REPUBLIC OF ECUADOR ("ECUADOR"); THE GABONESE REPUBLIC ("GABON"); REPUBLIC OF INDONESIA ("INDONESIA"); IMPERIAL GOVERNMENT OF IRAN ("IRAN"); REPUBLIC OF IRAQ ("IRAQ"); STATE OF KUWAIT ("KUWAIT"); LIBYAN ARAB REPUBLIC ("LIBYA"); FEDERAL REPUBLIC OF NIGERIA ("NIGERIA"); STATE OF QATAR ("QATAR"); KINGDOM OF SAUDI ARABIA ("SAUDI ARABIA"); STATE OF UNITED ARAB EMIRATES ("UNITED ARAB EMIRATES"); AND THE REPUBLIC OF VENEZUELA ("VENEZUELA"),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN OPPOSITION OF THE INDONESIA-U.S. BUSINESS COMMITTEE OF THE INDONESIAN CHAMBER OF COMMERCE AND INDUSTRY

(Continued on inside cover)

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MOTION OF THE INDONESIA-U.S. BUSINESS COMMITTEE OF THE INDONESIAN CHAMBER OF COMMERCE AND INDUSTRY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry ("IUBC") hereby moves pursuant to Rule 36 of the Rules of this Court for leave to file the attached brief herein as *amicus curiae* urging denial of the petition for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit.

IUBC is that committee of the Indonesian Chamber of Commerce and Industry, a private association, that has as its purpose to promote trade and commerce between Indonesia and the United States and to encourage mutual investment, particularly United States investment in Indonesia. The petition seeks reinstatement of a complaint which requested, *inter alia,* a permanent injunction prohibiting the Republic of Indonesia (as well as each of the other twelve sovereign state members of the Organization of Petroleum Exporting Countries) from implementing its national policy with respect to development of its principal natural resource and source of gross national product, oil. Since the climate of mutual business interests between Indonesia and the United States could be materially affected by the granting of such relief, IUBC has a significant interest in opposing this petition.

Each of the respondents "refused to recognize the jurisdiction of the district court, and they did not appear in the proceedings below," 649 F.2d at 1356; hence "[t]heir cause was argued by" IUBC, *id.,* in both the district court and the court of appeals, which relied significantly on the briefs and arguments submitted by IUBC. *See, e.g.,* 477 F. Supp. at 575. Similarly here, the proffered brief of IUBC may present the Court with the only statement of reasons for denying the petition.

Defendants' non-appearance precludes IUBC from filing its brief by "written consent of the parties", Rule 36.1, U.S. Sup. Ct. R., rather than making the instant motion.

For the foregoing reasons, IUBC respectfully requests that the Court grant this motion.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals was correct in affirming the District Court's refusal to enjoin the actions of thirteen sovereign nations in implementing mutually-formulated national policies regarding the extraction of their most valuable natural resource, oil?

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No. 81-645

IN THE

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OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AN ASSOCIATION,

Petitioner,

—against—

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BRIEF AS *AMICUS CURIAE* IN OPPOSITION OF THE INDONESIA-U.S. BUSINESS COMMITTEE OF THE INDONESIAN CHAMBER OF COMMERCE AND INDUSTRY

COUNTERSTATEMENT OF THE CASE

The International Association of Machinists and Aerospace Workers ("IAM") filed suit in December 1978 seeking both treble damages and an injunction against the thirteen sovereign nations comprising the Organization of Petroleum Exporting Countries ("OPEC"), as well as against OPEC itself. The complaint alleged that the petroleum development policies of such nations, including the taxes and royalties they impose, all of which substantially affect their national livelihoods,[1] constitute a conspiracy in restraint of trade actionable under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, since they include collective agreements regarding the revenues member states are to receive for the extraction and removal of crude oil. IAM further averred that as an ultimate purchaser of refined petroleum products it was injured in its business and property and hence entitled to sue.

The sovereign defendants diplomatically declined to appear on the ground that submission to the legal processes of the United States in this case would infringe upon their status as coequal sovereigns; the Department of State transmitted their protests to the district court.[2]

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[1] Up to 99.9% of export revenue and up to 80% of gross national product of the respondent countries are accounted for by such activity. OPEC 1975 *Annual Statistical Bulletin.*

[2] For example, the second diplomatic note regarding this case from the Department of Foreign Affairs of the Republic of Indonesia to the United States Embassy in Jakarta, dated July 25, 1979, which the State Department transmitted to the district court, reads in part (in unofficial translation):

> The referenced civil proceeding appears to assert a claim on behalf of private domestic entity in the United States against the Organization of Petroleum Exporting Countries, in which Indonesia is named as a defendant together with other members of the Organization of Petroleum Exporting Countries because of public, governmental, noncommercial Acts of State it has done in exercise of its sovereign rights over its petroleum resources exclusively within its own jurisdiction.
>
> * * *
>
> The Government . . . wishes to refer to the "Act of State Doctrine" which is fully recognized and applied by the international community, and expects that the United States will

The district court entered the defaults of the sovereign respondents[3] and proceeded to conduct a hearing pursuant to Section 1608(e) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(e), which permits entry of a default judgment against a foreign sovereign only if "the claimant establishes his claim or right to relief by evidence satisfactory to the court." At trial, five expert witnesses, including two designated by the district court itself, were called to testify. In response to the district court's public invitation, 477 F. Supp. at 576, four *amici curiae,* including IUBC, appeared by counsel at trial, and eleven *amicus* briefs were filed. "Exhibits, including masses of statistical and technical data, were received." 649 F.2d at 1356. As noted by the unanimous panel of the court of appeals:

> The record reflects an outstanding effort on the part of the district judge to amass the information necessary to understand the international politics and economy of oil and to marshal the legal arguments for and against IAM's requested relief.

Id.

The resulting findings of fact by the district court were adopted by the court of appeals: Prior to the founding of OPEC

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continue to honour this universal principle of international law and, therefore, the district court will not attempt to review the validity of acts performed by foreign sovereign nations within their own jurisdiction.

* * *

Therefore, the government of the Republic of Indonesia does not recognize the jurisdiction of the United States District Court on matters that affect its sovereignty. . . .

At least eight others of the sovereign state defendants protested the attempted exercise of jurisdiction over them by diplomatic note to the United States, and the Department of State conveyed the contents of such notes to the district court: Algeria, Ecuador, Kuwait, Nigeria, Qatar, Saudi Arabia, United Arab Emirates and Venezuela. No respondents appeared.

[3] The complaint against OPEC itself was dismissed on the ground, which "plaintiff and its counsel admitted," that OPEC itself "could not be and had not been legally served," 477 F. Supp. at 560. IAM has not challenged that action and finding either in the court of appeals or here.

in 1960 the international market was "plagued with fluctuating oil prices" and "oil was often in oversupply on the world market resulting in low prices." 649 F.2d at 1355. Since oil revenues "represent [respondents'] only significant source of income," this "near total dependence upon oil" rendered the consequences of such prices quite severe. *Id.* at 1358. Hence the respondent sovereigns "organized to obtain the greatest possible economic returns for a special resource which they hope[d] will remove them from the ranks of the underdeveloped and the poverty-plagued." *Id.* The chosen means of achieving these national goals was "a system of production limits and royalties which [respondents] unanimously adopt" at periodic OPEC conferences attended by each nation's petroleum minister. *Id.* at 1355. Respondents voluntarily implement OPEC's decisions within their respective territories through local decrees and other governmental acts, but have no means of enforcing them against one another other than through their "collective self-interest." *Id.;* 477 F. Supp. at 566. In short, as the district court concluded, "it is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource—to wit, crude oil—from its territory." *Id.* at 567.

The extensive activities of the United States Congress and Executive Branch in responding to respondents' oil policies were also established at trial:

> The record in this case contains extensive documentation of the involvement of our executive and legislative branches with the oil question. IAM does not dispute that the United States has a grave interest in the petro-politics of the Middle East, or that the foreign policy arms of the executive and legislative branches are intimately involved in this sensitive area. It is clear that OPEC and its activities are carefully considered in the formulation of American foreign policy.

649 F.2d at 1361. As the court of appeals also noted, "There is no question that the availability of oil has become a significant factor in international relations." *Id.* at 1360.

The district court, "understandably troubled by the broader implications of an anti-trust action against the OPEC nations" under such circumstances, *id.* at 1358, dismissed the complaint for injunctive relief[4] on three grounds: (1) the sovereign defendants acted in their public capacities and therefore were immune from suit under the FSIA, 477 F. Supp. at 569; (2) even if not immune, foreign sovereigns are not suable as "persons" within the meaning of the Sherman Act, *id.* at 572; and (3) in any event no proximate causal connection had been shown between respondents' activities and domestic price increases experienced by IAM, since "plaintiff did not even attempt to establish that the domestic gasoline it purchased was the product of any of the crude oil purchased from one of the defendant members of OPEC", *id.* at 574.

The court of appeals panel unanimously affirmed the district court's decision, but solely "on the alternate ground that, under the act of state doctrine, exercise of federal court jurisdiction in this case would be improper." 649 F.2d at 1355. It expressly declined to decide whether or not the FSIA allowed jurisdiction in this case "since a judicial remedy is inappropriate regardless of whether jurisdiction exists." *Id.* at 1362. Similarly, the court of appeals declined to "reach the issues regarding the indirect-purchaser rule, the extra-territorial appli-

[4] The district court at the commencement of trial had dismissed the treble damage claims on the authority of this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977). 477 F. Supp. at 563. It had continued to entertain the injunctive claim, however, persuaded by the Third Circuit's reasoning in *Mid-West Paper Products Co.* v. *Continental Group, Inc.,* 596 F.2d 573 (3d Cir. 1979), that indirect purchasers may sue for injunctive relief under the antitrust laws.

cation of the Sherman Act, the definition of 'person' under the Sherman Act, and the propriety of injunctive relief." 649 F.2d at 1362.[5]

In reaching its decision the court of appeals observed that "decisions about oil are the essence of sovereignty to the OPEC nations," *id.* at 1358, and that "the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources," a step fraught with the "possibility of insult to the OPEC states" and "an affront to [their] sovereignty", *id.* at 1361. "On the other hand, should the court hold that OPEC's actions are legal, this 'would greatly strengthen the bargaining hand' of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions. *Sabbatino,* 376 U.S. at 432 [*Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 432 (1964)]." *Id.* at 1361.

Recalling, too, this Court's reference in *Sabbatino,* 376 U.S. at 423, to the "constitutional underpinnings" of the act of state doctrine "in a system of separation of powers," the court of appeals concluded that the possibility "of interference with the efforts of the political branches to seek favorable relations with [respondents] is apparent from the very nature of this action and the remedy sought". 649 F.2d at 1361. The court expressed its unwillingness to "enter at the will of litigants into a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint." *Id.* Given, the court said, the "admonition in *Sabbatino* that the courts should consider the degree of codification and consensus in the area of law," the absence of an "international consensus condemning cartels, royalties, and production agree-

[5] The court of appeals likewise did not discuss other defenses advanced by this *amicus* to the district court (as well as to the court of appeals) but not decided by it: respondents' contacts with the United States were insufficient to satisfy the jurisdictional requirements of the FSIA; the Sherman Act does not reach respondents' "state action" under this Court's ruling in *Parker* v. *Brown,* 317 U.S. 341 (1943); the "political question" doctrine bars adjudication of this complaint; and venue was improper.

ments" was "another indication that judicial action is inappropriate here." 649 F.2d at 1361. In short, in the view of the court of appeals "the district court was understandably reluctant to proceed on the complaint below and the act of state doctrine provides sound jurisprudential support for such reluctance." *Id.*

ARGUMENT

The petition of IAM fails to demonstrate any "special and important reasons" for this Court to review the decision of the court of appeals. Sup. Ct. R. 17.1.

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE ACT OF STATE DOCTRINE IN ACCORDANCE WITH ESTABLISHED PRECEDENT

A. On Its Face This Case Falls Within The Act of State Doctrine

In its classic formulation the act of state doctrine is "[t]he principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . ." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303 (1918). As the court of appeals correctly noted, this Court in *Sabbatino* identified several situations in which the act of state doctrine is triggered: (i) where the issue at stake "touches on the national nerves" of the foreign sovereign, 376 U.S. at 428; (ii) where the Executive Branch has undertaken to deal with the issue without claiming violation of law, *id.* at 432; and (iii) where there is no "codification and consensus in the area of law" concerning the issue, *id.* at 428.

The instant case indisputably presents all three of these situations. The evident sensibilities of the respondents have been addressed by the Executive Branch with a policy of

"cooperation not confrontation." Executive Branch policy was early formulated by Secretary of State Kissinger as follows:

> [C]ooperation not confrontation must mark our relationship with the [oil] producers. . . . Our ultimate goal must be to create a cooperative framework within which producers and consumers will be able to accomodate their differences and reconcile their needs and aspirations. Only in this way can we assure the evolution and growth of the world economy and the stability of international relations.

70 Dep't State Bull. 201-02, 205-06 (1974). *See also* Presidential Energy Message to Congress (Jan. 7, 1977), 1 Energy Management (CCH) ¶ 713. The Executive's desire to avoid confrontation is further shown by the Justice Department's apparent decision not to sue the OPEC nations, *see* 125 Cong. Rec. 5029 (1975) (Attorney General Levi's statement that suit was under consideration), and by its concurrence in consent decrees permitting American oil companies to fix prices, allocate markets and limit production if required to do so by defendants (among others), *see United States* v. *Standard Oil Co. (New Jersey)*, [1960 Trade Cases] Trade Reg. Rep. (CCH) ¶ 69,849 (S.D.N.Y. 1960), *modified*, [1969 Trade Cases] ¶ 72,742 (S.D.N.Y. 1968); *United States* v. *Gulf Oil Corp.*, [1960 Trade Cases] Trade Reg. Rep. (CCH) ¶ 69,851 (S.D.N.Y. 1960), *modified*, [1969 Trade Cases] ¶ 72,743 (S.D.N.Y. 1968).[6] As to consensus on international law, it cannot even be said that this country, much less the rest of the world, condemns such arrangements. *See* the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2153b (directing President to "take immediate and vigorous steps" to obtain agreement among producing nations on terms for sale of nuclear energy equipment and technology); Long Term Cooperation Program,

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[6] As for Congressional action in this area, *see* 19 U.S.C. §§ 2462(d), 2118(a), expressly providing that members of OPEC, in order to be eligible for Presidential concession of certain trade preferences, must enter into trade agreements assuring "fair and equitable access at reasonable prices to supplies of articles of commerce which are important to the economic requirements of the United States . . . ."

entered into force March 8, 1976, 27 U.S.T. 231, T.I.A.S. No. 8229 (agreement among consuming nations to set minimum resale price for petroleum products); International Wheat Agreement, *opened for signature* March 29, 1971, 22 U.S.T. 820, T.I.A.S. No. 7144 (stabilizing international wheat trade); International Coffee Agreement, *opened for signature* March 18, 1968, 19 U.S.T. 6333, T.I.A.S. No. 6584 (stabilizing supply and demand to achieve "equitable" coffee prices). *See also* 649 F.2d at 1361, n.9.

The court of appeals eloquently described the application to the present facts of *Sabbatino*'s teaching that the act of state doctrine enables courts to avoid actions that will "hinder rather than further this country's pursuit of goals . . . in the international sphere," 376 U.S. at 423:

> To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

649 F.2d at 1358.

B. The Court of Appeals Correctly Applied The "Commercial Act Exception" Discussed By This Court In *Dunhill*

It cannot fairly be said that the court of appeals "bypassed decision on the commercial activity question" in applying the act of state doctrine. (Pet. 9). In fact, the court of appeals expressly assumed, as does petitioner, that this Court in *Dunhill* established a "commercial act exception" to the act of state doctrine that remained unaltered by the FSIA. 649 F.2d at 1360, n.8.

Applying the test discussed in *Dunhill*, "that purely commercial activity does not require judicial deference under the act of state doctrine," the court of appeals concluded correctly that the activity of the respondents at issue here "has a significant sovereign component" and therefore can in no event be termed "purely commercial." *Id.*

C. The Act Of State Doctrine Contains No Mechanical Requirement That The Act Be Exclusively Territorial

Petitioner objects that the act of state doctrine is not relevant to the present controversy since the allegedly unlawful activity of respondents involved meetings of their oil ministers which necessarily occurred outside the national borders of at least some of the countries. Petitioner relies upon dicta in classic confiscation cases which describe the act of state doctrine as applying to acts of a foreign government "done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). (Pet. 8).

To convert such references into a mechanical requirement of exclusively territorial action would produce obviously absurd results. Surely the respect to be accorded by other countries to a United States statute does not depend upon whether the President signed it into law abroad (as he sometimes does) or in Washington. And just as surely the respect to be accorded the decisions of the respondents' oil ministers does not hinge upon whether they took those decisions at a meeting outside of their respective national borders, or rather through a telephonic conference call joining their capitals. The decisions of government ministers taken at meetings of the European Economic Community, the North Atlantic Treaty Organization or other

international organizations, and treaties signed abroad, cannot be deprived of their sovereign force simply because the participants were physically outside their home territory.

The real test is whether the acts which a court is asked to review were within the sovereign jurisdiction of a foreign country, and judicial references to territoriality are merely synecdoche for that broader concept. Acts of a sovereign "done within its own territory" are *not* always entitled to the protection of the act of state doctrine where, for example, they seek to affect the status of property located within the territorial jurisdiction of another state, *see e.g., Republic of Iraq* v. *First Nat'l City Bank, Administrator,* 241 F.Supp. 567 (S.D.N.Y.), *aff'd,* 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966), or consist of judicial decrees of foreign courts rendered without proper jurisdiction. *Rose* v. *Himley,* 8 U.S. (4 Cranch) 240 (1808). It is unquestionable that respondents' petroleum ministers were acting within their respective countries' sovereign jurisdiction in meeting with their counterparts from other countries regarding domestic matters entrusted to their charge. The respondents' local implementation of production controls and royalty requirements through national legislation and other governmental acts should not be open to question simply because such meetings occurred outside their territory.

II.

NONE OF THE ISSUES DISCUSSED BY THE DISTRICT COURT BUT NOT REACHED BY THE COURT OF APPEALS JUSTIFIES ISSUING A WRIT OF CERTIORARI

Petitioner asserts that in addition to the act of state doctrine several other questions of law, resolved by the district court in favor of respondents but expressly not decided by the court of appeals, warrant review by this Court. This Court has stated, however, that it "will not ordinarily consider" issues not treated by the court of appeals. *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *NLRB* v. *Sears Roebuck & Co.,* 421 U.S. 133, 163-64 (1975); *see also Ramsey* v. *United Mine Workers,* 401 U.S. 302, 312 (1971). No reason exists here to depart from that principle.

A. The Question Whether A Foreign Sovereign Is A "Person" For Purposes Of Suit Under Section 1 Of The Sherman Act Is Not Appropriate For Review By This Court At This Time

Despite petitioner's claim that the question whether a foreign sovereign is a "person" within the meaning of Section 1 of the Sherman Act for the purpose of being sued is "one of extreme and increasingly frequent importance to our legal and economic systems" (Pet. 11), no case has found it necessary to reach the issue.[7] Petitioner cites but a single district court decision, *Outboard Marine Corp.* v. *Pezetel,* 461 F. Supp. 384 (D. Del. 1978) (Pet. 11), which, however, involved a Polish government sponsored commercial agency, *id.* at 396, 398, not the foreign government itself, and hence did not pose the "person" issue. This Court should await further decisions by the lower courts before determining whether it is appropriate to bar antitrust suits against foreign sovereigns, even though they may bring such suits, *Pfizer, Inc.* v. *India,* 434 U.S. 308 (1978)—the situation that obtains with respect to states of the Union, *compare Georgia* v. *Evans,* 316 U.S. 159 (1942) (state may sue), *with Parker* v. *Brown,* 317 U.S. 341 (1943) (state may not be sued).

B. Neither The District Court's Application Of The Law Nor The Facts Of The Case Render This An Apt Occasion For Elucidation Of *Illinois Brick*

Petitioner asserts that the district court decision in this case held, "in direct conflict with" *Illinois Brick* v. *Illinois,* 431 U.S. 720 (1977), "that *only* direct purchasers may recover from a pricefixer" (emphasis in original). (Pet. 12). Inconsistently,

---

[7] Petitioner concedes that it is "unaware of any federal Court of Appeals which has upheld application of the Sherman or Clayton Acts to foreign states". (Pet. 11). In fact, dicta indicate that foreign sovereigns are *not* "persons" subject to Sherman Act liability. *Hunt* v. *Mobil Oil Corp.,* 550 F.2d 68, 78 n. 14 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977); *Interamerican Refining Corporation* v. *Texas Maracaibo, Inc.* 307 F. Supp. 1291, 1298 n. 18 (D. Del. 1970).

petitioner alleges the district court held that an indirect purchaser may sue but that "a pre-existing cost-plus contract [is] essential to circumvention of the *Illinois Brick* rule . . . by indirect purchasers" (Pet. "Question Presented for Review"); whereas, petitioner maintains, in citing cost-plus contracts "*Illinois Brick* provides merely inclusive examples where market forces have been superseded", and "implies that other economic circumstances permitting a similar result should be given similar latitude" (Pet. 11-12).

Contrary to both these assertions, the district court made entirely clear its understanding "that there may be instances where an indirect purchaser could be a proper plaintiff"; and that while a "pre-existing cost-plus contract was cited as such an exception" by this Court in *Illinois Brick,* it was merely illustrative. 477 F. Supp. at 562. The district court permitted IAM to offer proof of circumstances "analogous" to cost-plus status even though IAM was "eight times removed from" respondents, *id.* at 561, but it found the proffered facts "not in any way analogous," *id.* at 563. The district court also entertained two other theories of exception to *Illinois Brick* not directly related to the cost-plus exception, but concluded that petitioner's factual contentions in regard to these theories were "frivolous," "extremely general and vague," that IAM "utterly fail[ed] to allege any facts to support" its charges and that "no evidence of any kind was adduced" to substantiate them. *Id.* Surely any elucidation by this Court of the "indirect purchaser" exceptions to *Illinois Brick* should await a more propitious record.

III.

THERE ARE NO POLICY REASONS FOR GRANTING CERTIORARI IN THIS CASE

A. This Case Involves No Conflict Between Circuits

Petitioner contends that there is a conflict between two circuits as to what constitutes commercial activity by a foreign sovereign state. That is not correct.

In both cases cited by petitioner, *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) and *Sugarman* v. *Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980), the court determined whether an act of a sovereign-owned airline was commercial by examining the "nature" of the act. In *Arango*, the plaintiffs' injury arose because their

> jaunt terminated abruptly and prematurely when Dominican immigration officials denied them entry into that country upon their arrival at the airport in Santo Domingo, apparently because of their inclusion on an official list of "undesirable aliens".

621 F.2d at 1373. The Fifth Circuit held that the acts of airline personnel in assisting Dominican immigration officials were performed as agents of the government in carrying out the governmental function of controlling immigration, and hence were not commercial acts. In *Sugarman*, however, the airline's act in issue was an unexplained (and presumably operational) delay in departing from a Mexican airport, not the execution of a sovereign function at the request of the Mexican government. The divergent results produced when two circuits apply the identical legal test to different sets of facts in no way suggest a conflict between them.

B. Review Of This Case Would Not Materially Assist Lower Courts In Applying The Act Of State Doctrine

Each individual application of the act of state doctrine is unique and requires that the "courts balance various factors to determine whether the doctrine should apply." 649 F.2d at 1359. The doctrine is a "prudential" one, *id.*, and in each case involves the evaluation of multifarious and highly sensitive political considerations. As a result, this Court has not often found it appropriate to review lower court decisions in this field. *See, e.g., Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980); *Hunt* v. *Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y.), *aff'd*, 550 F.2d 68 (2d Cir. 1976), *cert. denied*, 434 U.S. 984 (1977); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331

F. Supp. 92 (C.D. Cal.), *aff'd*, 461 F.2d 1261 (9th Cir. 1971), *cert. denied*, 409 U.S. 950 (1972). The peculiar combination of foreign sovereign sensitivities, Executive Branch and Congressional engagement, and lack of international consensus presented by this case (*see Sabbatino*, 376 U.S. at 428, 432) and its underlying "masses of statistical and technical data," 649 F.2d at 1356, are unlikely to be replicated or even approximated. No general lessons for lower courts would result from further review.

C. Granting The Requested Writ Would Be Unlikely To Change The Result In This Case

Dismissal of the complaint in this case is a just result unlikely to be altered by grant of the writ petitioner seeks. The district court disposed of this litigation on three separate grounds not decided by the court of appeals. 477 F. Supp. at 575; 649 F. 2d at 1356-57. One of them—the lack of a causal connection between respondents' activities and any harm suffered by petitioner—is highly fact specific and rests on findings made by the district court at the time of trial. The district court also could have adopted any one of several additional bases for dismissal which were advanced by this *amicus* but not reached by that court. *See* footnote 5, *supra*. Given the multiple substantive bases for dismissal, it seems highly unlikely, even should this Court grant the petition and ultimately reverse the court of appeals' application of the act of state doctrine, that this case would ever end differently. Thus granting the petition would be unlikely to accomplish anything other than protraction of the irritation caused to United States relations with the respondent countries.

CONCLUSION

For the reasons above stated, IAM's petition for a writ of certiorari should be denied.

Respectively submitted,

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Supplemental Amicus Brief

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No. 81-645

IN THE

Supreme Court of the United States

October Term, 1981

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AN ASSOCIATION,

Petitioner,

—against—

THE ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES ("OPEC"); THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA ("ALGERIA"); THE REPUBLIC OF ECUADOR ("ECUADOR"); THE GABONESE REPUBLIC ("GABON"); REPUBLIC OF INDONESIA ("INDONESIA"); IMPERIAL GOVERNMENT OF IRAN ("IRAN"); REPUBLIC OF IRAQ ("IRAQ"); STATE OF KUWAIT ("KUWAIT"); LIBYAN ARAB REPUBLIC ("LIBYA"); FEDERAL REPUBLIC OF NIGERIA ("NIGERIA"); STATE OF QATAR ("QATAR"); KINGDOM OF SAUDI ARABIA ("SAUDI ARABIA"); STATE OF UNITED ARAB EMIRATES ("UNITED ARAB EMIRATES"); AND THE REPUBLIC OF VENEZUELA ("VENEZUELA"),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION OF THE INDONESIA-U.S. BUSINESS COMMITTEE OF THE INDONESIAN CHAMBER OF COMMERCE AND INDUSTRY

(Continued on inside cover)

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The Opposition to the Motion of the Indonesia—U.S. Business Committee of the Indonesian Chamber of Commerce and Industry ["IUBC"] for Leave to File a Brief as *Amicus Curiae,* submitted by the International Association of Machinists and Aerospace Workers, makes allegations regarding IUBC which, although never made before the district court or the court of appeals, IUBC believes it appropriate to address by submitting to this Court, as an appendix to its Motion, the annexed affidavit of Mr. Tony Agus Ardie, Chairman of IUBC.

CONCLUSION

The Court is respectfully requested to grant the Motion for Leave to File Brief as *Amicus Curiae* of the Indonesia—U.S. Business Committee of the Indonesian Chamber of Commerce and Industry.

Respectfully submitted,

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APPENDIX

City of Jakarta
Republic of Indonesia
November 27, 1981

AFFIDAVIT OF TONY AGUS ARDIE

Subscribed and sworn:

I, TONY AGUS ARDIE, being first duly sworn, depose and say:

1. I am a citizen of the Republic of Indonesia and currently serve as chairman of the Indonesia-U. S. Business Committee of the Indonesian Chamber of Commerce and Industry, which has filed a motion for leave to file a brief Amicus Curiae in International Accosiation [sic] of Machinists and Aerospace Workers v. the Organization of Petroleum Exporting Countries et. al., no. 81-645, pending in the United States Supreme Court. I make this affidavit in response to the opposition to that motion filed by the International Association of Machinists and Aerospace Workers.

2. The Indonesian Chamber of Commerce and Industry is a private organization established in 1968 pursuant to the laws of the Republic of Indonesia and is owned, controlled and governed by its members, all of whom are representatives of private business interests in the Republic of Indonesia. The Chamber thus is not an "arm of the Indonesian government".

3. On April 17, 1979, the Chamber established the Indonesia-U. S. Business Committee (IUBC), of which I am chairman as of July 17, 1979, as a Committee of the Chamber, in order to provide specific point of contact between the Chamber and its members on the one hand and an American organization known as the U. S.-Indonesia Business Alliance (Alliance), located in Los Angeles, California, on the other hand. The Alliance is completely separate, distinct and unaffiliated American organization of American business interests which desire to promote U. S. business and investment in Indonesia. The

Alliance held a major seminar open to the public on business and investment opportunities in Indonesia April 16-17, 1979, which seminar provided the impetus for establishment of IUBC. There is no binding connection between the IUBC and the Alliance other than their mutual interests. These facts are reflected in the following objectives stated in IUBC's charter:

> "To serve as a communications link between the U. S.-Indonesia Business Alliance in Los Angeles, California, USA and the Committee (IUBC) in Jakarta, Indonesia".
>
> "To promote and develop commerce and business between the USA and Indonesia".
>
> "To promote and attract U. S. investors to invest in Indonesia".
>
> "To collect, evalute and forward to the U.S.—Indonesia Business Alliance statistics and other information concerning commerce, investment opportunities and other topics of interest to U.S. businessmen".
>
> "To represent, express and give effect to the opinions of member businessmen both in Indonesia and the USA regarding trade, commerce, finance, agriculture, industry, manufacturing and other subjects bearing on their respective business interests".
>
> "To support undertakings and efforts of mutual benefit to the interests of both the Indonesia—U.S. Business Committee (Indonesia) and the U.S.— Indonesia Business Alliance (US), and do any and all other things incidental or related to the attainment of the above objectives".
>
> "The Committee will have no religious, political nor profit making aims and will not involve itself in other than the Chamber and U.S.—Indonesia Business Alliance activities".

4. Neither Pertamina, the state oil and natural gas enterprise of Indonesia, nor any company by the name of

Perta Oil Marketing Ltd. is a member of the Indonesian Chamber of Commerce and Industry, or of IUBC, and neither one is an "originating source" of IUBC, which was established as set forth above.

5. IUBC first filed a motion to appear as amicus curiae in the District Court in the case which is the subject of no. 81-645 in the United States Supreme Court on August 1, 1979.

Executed at Jakarta on November 27, 1981.

/s/ TONY AGUS ARDIE

TONY AGUS ARDIE

REPUBLIC OF INDONESIA
CITY OF JAKARTA
EMBASSY OF THE UNITED STATES
OF AMERICA
} ss:

Subscribed and sworn to before me this 27th day of November, 1981

/s/ M. PATRICIA WAZER

M. PATRICIA WAZER
Consul of the
United States of America

Petitioner's Reply Brief

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CLERK

No. 81-645

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Opposition to Motion of the Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry for Leave to File Brief as Amicus Curiae.

Brief in Reply to Amicus Curiae Brief in Opposition.

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OPPOSITION TO MOTION OF THE INDONESIA-U.S. BUSINESS COMMITTEE OF THE INDONESIAN CHAMBER OF COMMERCE AND INDUSTRY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry ("IUBC") has moved pursuant to Rule 36 of the Rules of this Court for leave to file an *amicus curiae* brief urging denial of the petition for a writ of *certiorari* herein.

While IUBC has appeared as *amicus curiae* at both the trial and appellate court, it has from the beginning espoused views and argued in accord with a "pro-respondent" position.

Investigation by petitioner has shown in part that the IUBC did not exist prior to the filing of this action, nor can it currently be located or identified within the United States or Indonesia other than in relation to this action; the parent Indonesian Chamber of Commerce and Industry is apparently an arm of the Indonesian Government located in Jakarta.

The Los Angeles Foreign Representative Office of Pertamina, the Indonesian National Oil Company, Pertamina USA, 2029 Century Park East, Suite 1100, Los Angeles, California 90067, (213) 277-3721 and Perta Oil Marketing Ltd., 450 North Roxbury Drive, Suite 1020, Beverly Hills, California 90210, continue to do business in the Central District of California and petitioner knows no originating source for the IUBC other than those two Los Angeles organizations.

Petitioner therefore prays that the Court deny the instant motion to file an amicus brief and/or order the IUBC to

clarify its interests in this action. In the alternative, petitioner asks that the instant motion of the derivative entity be deemed to constitute a general appearance by the Republic of Indonesia in this action.[1]

---

[1]The better approach for Indonesia would be to file an *amicus curiae* brief in accord with Sup. Ct. Rules 22 and 36. This is the preferred method for a foreign government party to present its views to the Court. See, e.g., letter from Department of Justice, May 6, 1980. Trade Reg. Rep. ¶50,416 (CCH) (diplomatic notes from sovereign states disfavored by the Court).

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Respondents.

Brief in Reply to Brief in Opposition of the Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry as Amicus Curiae.

ARGUMENT.

In the event the motion of IUBC for leave to file as *amicus curiae* is granted, petitioner hereinbelow addresses arguments raised in the proposed brief. Sup. Ct. R. 22.5.

I.
ACT OF STATE DOCTRINE.

A. Classic Formulation of the Doctrine.

The IUBC ("Amicus") sets forth a partial quotation from *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) as the "classic formulation" of the act of state doctrine. Opp. p. 7. According to Amicus, the doctrine consists merely of "[t]he principle that the conduct of one independent government cannot be successfully questioned in the courts of another." Opp. p. 7. However, this Court has consistently cited *Underhill v. Hernandez*, 168 U.S. 250 for "[t]he classic American statement of the act of state doctrine," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 at 416, "where Chief Justice Fuller said for a unanimous court (p. 252):

> 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.' "
>
> *Id.* at 416.

Amicus terms the "territorial" element of the act of state doctrine as "dicta in classic confiscation cases." Opp. p. 10. In making the argument that the "territorial" requirement of the doctrine applies only to confiscation cases, Amicus seeks to "have its cake and eat it too," for if the doctrine is to be applied as formulated by this Court, then it must be applied according to the "territorial" language the Court has used. While arguing for a piecemeal approach to application of the doctrine, Amicus nevertheless desires that the doctrine be applied to the instant *non*-confiscation

case, involving nations which must perform acts of price-fixing outside of their own territory. Pet. p. 8. Amicus' argument and formulation of the act of state doctrine is not consistent with *Sabbatino* and should not be followed by this Court.

B. Territory v. Jurisdiction.

Amicus further hypothesizes that:

> "The real test is whether the acts which a court is asked to review were within the sovereign jurisdiction of a foreign country, and judicial references to territoriality are merely synecdoche for that broader concept." Opp. p. 11.[2]

As the court is aware, the distinction between jurisdiction and territoriality is of considerable importance. Recent cases brought under the Foreign Sovereign Immunities Act of 1976 ("FSIA") for hostage compensation against Iran have alleged that the United States Embassy in Iran is part of the territory of the United States. While the United States Department of Justice has taken the position that the Embassy is not part of United States Territory,[3] there is no question

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[2]Amicus' formulation of the act of state doctrine might prevent our courts from *ever* questioning the conduct of another sovereign. This has not been the law in the United States since at least as early as 1824 when Justice Marshall wrote "that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Bank of the United States v. Planters' Bank*, 22 U.S. 904, 906 (1824). See Ponsoldt: *Note, The Liability of Foreign Governments Under United States Antitrust Laws*, GA. JRNL. INT. & COMP. LAW, Winter 1981 [hereinafter cited as Note: Antitrust Laws], p. 120.

[3]See MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANT UNITED STATES OF AMERICA TO DISMISS, *McKeel v. Islamic Republic of Iran, et al.*, C.A. No. 81-0931 (C.D. Cal. Aug. 27, 1981), pp. 30-35 and REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANT UNITED STATES OF AMERICA TO DISMISS, *id.* at 22-27. See also, OPINION OF DISTRICT JUDGE GESELL, consolidated *Williams* and *Lanterbach* cases, "It is clear both in international law and under American law that an embassy is not considered part of the territory of the sending state" (Tr. June 11, 1981 at p. 4) Accord, *Ann Elisa Moeller, et al. v. Iran*, C.A. No. 80-1171 (D.D.C. Aug. 5, 1981).

but that the Embassy is, to use Amicus' words, "within the sovereign jurisdiction" of the United States.[4]

According to Steiner and Vagts, "Act of state refers to 'public acts' which have been completely 'executed' within the foreign territory."[5] This test is not met by respondents who have met and continue to meet and set the price of oil *outside* their own territories.[6]

C. International Consensus Regarding Restrictive Trade Practices.

Amicus cites the Circuit Court herein for the proposition that "the absence of an 'international consensus condemning cartels, royalties, and production agreements' was 'another indication that judicial action is inappropriate here.' 649 F.2d at 1361." Opp. 6-7. Amicus goes on to state that neither this country nor the rest of the world condemn price-fixing, market allocation and production controls. Opp. p. 8.

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[4]*United States v. Erdos*, 474 F.2d 157 at 159-160 (4th Cir. 1973) *cert. denied* 414 U.S. 876 (1973) (basing jurisdiction over embassy on Title 18 U.S.C. §7), *Rocha v. United States*, 288 F.2d 545 at 549 (9th Cir. 1964) (basing jurisdiction over consulate offices abroad on Title 18 U.S.C. §1546).

[5]Steiner and Vagts, *Transnational Legal Problems*, 2d Ed. Foundation Press 1976 [hereinafter Steiner], p. 676. See also, Note: Antitrust Laws, *supra* note 2, at 123-124.

[6]As recently as October 29, 1981, respondents oil ministers met in Geneva, Switzerland and agreed on the latest price-fix — $34 per barrel — as announced by oil minister Ali Khalifa of Kuwait, (the respondent nation currently attempting to purchase Santa Fe International Corporation, a domestic United States oil drilling and refinery interest). In addition, Rene G. Ortiz, OPEC Secretary General, recently told the American Petroleum Refiners Association that OPEC nations are seeking "a share of existing refining capacity" "OPEC's Downstream Strategy Hasn't Reached U.S. — Yet." OIL DAILY, July 3, 1980. Surely, vertical integration, such as this, when contemplated by a cartel controlling at least 50% of oil exports worldwide (PETROLEUM INTELLIGENCE WEEKLY, Sept. 8, 1980, p. 4), warrants judicial attention as a commercial enterprise. See: *Issues* NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY, Fall, 1980, pp. 193-215.

Such sweeping statements ignore recent pronouncements by the U.N. General Assembly and earlier Common Market actions.

United Nations.

In December 1980, the United Nations General Assembly *unanimously* passed Resolution 35/63 and thereby approved and incorporated *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*[7] ("Principles"). The Principles as incorporated into Resolution 35/63 condemn, when "likely to have adverse effects on international trade", "Agreements fixing prices including as to exports and imports; . . . Allocation by quota as to sales and production; . . ." and "Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature."[8]

Common Market (EEC).

In addition, Articles 85 and 86 of the Treaty of Rome[9] directly address price fixing, production controls and agreements relating thereto in the Common Market Context.[10]

D. Executive Silence.

Amicus suggests that this Court should uphold application of the act of state doctrine because the Executive has addressed the "evident sensibilities" of respondents "with a policy of 'cooperation not confrontation.' " Opp. pp. 7-8.

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[7]*Resolutions and Decisions* General Assembly United Nations 35th Sess., Supplement No. 48, 35/63 "Restrictive Business Practices."

[8]Principles, A/C.2/35/6 23 October 1980 Annex, United Nations Conference on Trade and Development, p. 7.

[9]Treaty Establishing the European Economic Community, Article 85 and 86. Reproduced in *Intergovernmental Conference on the Common Market*, Dublin, Stationery Office, 1972.

[10]The Court's attention is directed to the cases collected by Steiner, *supra* note 5, at pp. 1342-1420. According to Steiner, "the wording of Articles 85 and 86 is often reminiscent of the Sherman Act and certain portions of the Clayton Act. American Antitrust principles influenced the drafting of the treaty." *Id.* at 1343.

Aside from the legislative and Executive direction contained in the FSIA directing the courts to set the limits of jurisdiction over sovereigns, the Executive has made no comment, suggestion, or *amicus* appearance in this action though specifically requested to do so by the District Court.[11] Questions of sovereign immunity must be determined by the courts, especially where the Executive has remained silent. See: *Republic of Mexico v. Hoffman*, 324 U.S. 30 at 34-35 (1945), *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964) at 360.[12]

II.

ISSUES NOT REACHED BY THE COURT OF APPEALS.

Amicus cites several decisions of this Court to show that the Court "will not ordinarily consider" issues, not treated by the Court of Appeals. Opp. p. 11. This mischaracterization of the law is exposed upon closer review of Amicus' own cases.[13]

Where, as in the instant case, all issues raised in the petition were raised before the District Court, discussed by the District Court in its opinion, and raised before the Circuit Court (which also issued an opinion), those issues are properly considered by the Court.[14]

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[11]See, Pet. Appendix p. A44.

[12]Petitioner recognizes that *Hoffman* and *Victory Transport* address sovereign immunity as opposed to act of state. However, as indicated in note: Antitrust Laws *supra* fn. 2, the doctrines are closely interwoven and cannot be discussed independently.

[13]"Where issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress and Co.*, 396 U.S. 144, 147 n. 9 (1970); *N.C.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975) (lower court issued no opinion on legal issue and Court of Appeals affirmed without decision); "we find no reference to this aspect of the case in the opinions in the District Court and the Court of Appeals." *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312 (1971).

[14]Sup. Ct. R. 21.1(a) and *id.*

A. States as Persons Under the Sherman Act.

The position of Amicus regarding the "person" question is that the "Court should await further decisions by the lower courts before determining whether it is appropriate to bar antitrust suits against foreign sovereigns", Opp. p. 12.

Petitioner, however, asserts that the question of whether foreign states may be sued as persons under the Sherman Act is "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1.

This Court in *City of Lafayette, LA. v. LA. Power & Light Co.*[15] had opportunity, in the same term *Pfizer*[16] was decided, to address the issue of whether municipalities are subject to our antitrust laws. In language which effectively narrows the holdings in *Georgia v. Evans*, 316 U.S. 159 (1942) (state may sue) and *Parker v. Brown*, 317 U.S. 341 (1943) (state may not be sued), the Court stated:

> "Although both *Chattanooga Foundry* and *Georgia v. Evans* involved the public bodies as plaintiffs, whereas petitioners in the instant case are defendants to a counterclaim, the basis of those decisions plainly precludes a reading of 'person' or 'persons' to include municipal utility operators that sue as plaintiffs but not to include . . . [them] . . . when sued as defendants."[17] 435 U.S. at 397.

The Court again looked to *Georgia v. Evans*, 316 U.S. 159 (1942) as authority for its finding in *Pfizer* that foreign states could sue under antitrust laws in our courts, thus affirming its rejection of "the proposition that the word

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[15]435 U.S. 389 (1978)

[16]*Pfizer, Inc. v. India*, 434 U.S. 308 (1978)

[17]The Court's attention is drawn to its discussion of the *Parker* doctrine in *Lafayette*, 435 U.S. 389 at 391-400

'person' as used in the antitrust laws excludes all sovereign states.''[18]

Following the thread of this Court's analogy of domestic state to domestic municipality to foreign state, in a Sherman Act ''person'' context, it becomes clear that Congress likewise could not have wanted to deny all redress to its citizens ''when mulcted by a violator of the Sherman law, merely because'' the violator is a foreign nation.[19]

III.
POLICY REASONS FOR GRANTING CERTIORARI.

A. Conflict Among the Circuits.

Amicus seeks to show that the Circuit Court decisions in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) and *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980) are not in conflict because both courts applied the ''nature of the act'' test of commerciality. It is however this very test which must be clarified by the Court.

As shown by review of the cases collected by petitioner at Pet. p. 7 and more importantly by the lower court's decision in this case, there is a clear judicial misunderstanding of Congressional intent,[20] and this misunderstanding is reflected in the conflicting misapplication of the ''nature'' test.

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[18] *Pfizer, Inc. v. India*, 434 U.S. at 317-318

[19] *Id.* at 318. See also, Note: Antitrust Laws, *supra* fn. 2, at pp. 126-131.

[20] In discussing the definition of ''commercial activity'' under the Foreign Sovereign Immunities Act of 1976, ''mineral extraction company'' and ''airline[s]'' are specifically cited by Congress as commercial activities, especially if ''customarily carried on for profit.'' *Legislative History*, H.R. Rep. No. 94-1487, Cong. Record Vol. 122 (1976), at 6614-6615. Thus, it seems apparent that the lower court herein and the *Arango* Court, diverged not only from the Third Circuit's *Sugarman* opinion, but from the expressed intent of Congress, in reaching their respective decisions on governmental commercial activity. See also Paust, *The Mexican Oil Spill & Jurisdiction, Immunity, and Acts of State*, HOUSTON JRNL. INTR. LAW, Vol. 2, 1979 pp. 246-251.

B. Departure From Prior Decisions of This Court.

Moreover, the Circuit Court herein has departed from specific decisions of this Court which spoke to the issues presented in this action, thus warranting review on certiorari. Sup. Ct. R. 17.1(c).

Although *American Banana*[21] applied the act of state doctrine to claims involving antitrust violations by a foreign government, the Court in *Continental Co. v. Union Carbide*, 370 U.S. 690 held that:

> "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."
>
> *Id.* at 704.

Continental involved alleged antitrust violations by an arm of the Canadian government related to a conspiracy effectuated both domestically and abroad. *Id.* at 706.

Pursuant to *Continental* and its progeny,[22] our antitrust laws have been extended to have extraterritorial effect over the prohibited acts of corporations[23] and over such acts performed by arms of governments. *Continental*, *supra*, and *Outboard Marine Corp. v. Pezetel*, 461 F.Supp. 384, 403-407 (D.C. Del. 1978).

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[21] *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-358 (1909).

[22] See *Mannington Mills v. Congloeum Corporation*, 595 F.2d 1287, 1299 (3d Cir. 1979); *U.S. v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases ¶70,600, at p. 77, 456-57 (S.D.N.Y. 1962); *Fleischman Distilling Corp. v. Distillers Co., Ltd.*, 395 F.Supp. 221, 226-227 (S.D.N.Y. 1975); and *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1253-1256 (7th Cir. 1980).

[23] See, e.g., *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1253 (7th Cir. 1980).

Conclusion.

Should the Court fail to review the commercial activity test of the Foreign Sovereign Immunities Act, it will leave foreign government cartels free to control the distribution and sale of strategic resources right down to the consumer.

To call such commercial acts as those engaged in by respondents "governmental" avoids reality. The act of state doctrine in an antitrust context has not been upheld by this Court since *American Banana* in 1909. It is imperative, therefore, that the Court clarify application of the "resurrected" act of state doctrine in a Sherman Act context.

For the above stated reasons, petitioner prays that the Court grant certiorari.

Respectfully submitted,

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